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## Survey of Illinois Law for the Year 1952-1953

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# CHICAGO-KENT LAW REVIEW

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## SURVEY OF ILLINOIS LAW FOR THE YEAR 1952-1953\*

### I. BUSINESS ORGANIZATIONS

#### CORPORATIONS

THIS CURRENT SURVEY opens on the note that corporate promoters may frequently have occasion to enter into contracts prior to the formation of, but designed to benefit, those corporations whose intended interests they seek to promote. Upon incorporation, each such newly-formed company would be entitled to adopt the benefits of these contracts and, if it should do so by express resolution, become bound by the terms thereof even though it could not have acted as principal at the time of making.<sup>1</sup> In the absence of an express resolution on the point, it has been held that an implied adoption may arise, particularly where the corporation has accepted the benefits of the promoter's pre-incorporation contract,<sup>2</sup> although this is usually so only where the parties can be said to have dealt in contemplation of the possibility of such adoption.<sup>3</sup> The case of *Perry v. Nevin Hotel Company*<sup>4</sup> now

\* The present survey is not intended in any sense to be a complete commentary upon, or annotation of, the cases decided by the Illinois courts during the past year, but is published rather for the purpose of calling attention to cases and developments believed significant and interesting. The period covered is that of the judicial year, embracing from 412 Ill. 309 to 415 Ill. 182; from 347 Ill. App. 182 to 350 Ill. App. 590. Statutory changes of general interest are also noted.

<sup>1</sup> *Rockford, Rock Island & St. Louis R. R. Co. v. Sage*, 65 Ill. 328 (1872). See also Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.16, as to corporate acceptance of pre-incorporation subscription agreements, and § 157.20, dealing with payment for pre-incorporation expenses.

<sup>2</sup> *Battelle v. Northwestern Cement & Concrete Pavement Co.*, 37 Minn. 89, 33 N. W. 327 (1887).

<sup>3</sup> *Washburn v. Hoxide Institute*, 249 Ill. App. 194 (1928).

<sup>4</sup> 349 Ill. App. 22, 109 N. E. (2d) 810 (1953).

adds the further thought that, in cases where an implied adoption is possible, the corporation may become bound to a contract which would normally fall within the provisions of the Statute of Frauds,<sup>5</sup> provided some written memorandum exists sufficient to bind the promoter. That holding was achieved on the theory that the ratification also constitutes a demonstration of confirmation of authority on the part of the supposed "agent" to make the memorandum in the first instance.<sup>6</sup>

While little has been said regarding the corporation and the relation it bears to outsiders, some significant points have been made concerning internal operations. The rule as to fair dealing, rather than arm's length dealing, between corporate director and shareholder, particularly when the former has secret knowledge of matters affecting the worth of the outstanding shares, has been the requirement in this state at least since the decision in the case of *Agatucci v. Corradi*,<sup>7</sup> a case which dealt with a purchase by the director, in his own right, of shares held by the stockholder. A logical extension of that rule has now been accomplished through the medium of the case of *Northern Trust Company v. Essaness Theatres Corporation*<sup>8</sup> to a situation wherein the cognizant director procured the purchase, by the corporation, of some of its outstanding stock without revealing the fact of a pending beneficial transaction which would, if concluded, materially increase the worth of the shares. The fact that a probate court had approved and authorized the sale of the decedent's shares at the lower figure was held to be immaterial since not properly *res judicata* on the point.

Reminder is offered, by the case of *Robb v. Eastgate Hotel*,<sup>9</sup> that the rights of dissenting minority shareholders who oppose a sale of corporate assets are not limited to the statutory proceeding

<sup>5</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 59, § 1. The employment contract involved in the Perry case was one intended to run for five years.

<sup>6</sup> See 37 C. J. S., Frauds, Statute of, § 214.

<sup>7</sup> 327 Ill. App. 153, 63 N. E. (2d) 630 (1945), noted in 24 CHICAGO-KENT LAW REVIEW 272.

<sup>8</sup> 348 Ill. App. 134, 108 N. E. (2d) 493 (1952), noted in 1953 Ill. L. Forum 144. Leave to appeal has been denied.

<sup>9</sup> 347 Ill. App. 261, 106 N. E. (2d) 848 (1952).

to secure the true worth of the shares held<sup>10</sup> but may extend to a suit in equity, if fraud is present, to enjoin the proposed sale. The views of the Appellate Court for the First District on the point now coincide with those previously expressed by the court sitting in the Third District.<sup>11</sup> The decision in *Schmidt v. Crowell-Collier Publishing Company*,<sup>12</sup> on the other hand, suggests the presence of a further limitation to be observed by the minority shareholder when bringing suit in the event his corporation should, at the time, be under the jurisdiction of a bankruptcy court. It was there held that a suit for damages for defamation of his corporation, brought in its behalf, could not be conducted by the shareholder, despite a failure on the part of the proper officials to act, in the absence of a judicial order, entered by the bankruptcy court, abandoning the claim as not being an asset in bankruptcy. For lack of such an order, the minority shareholder's complaint was there ordered dismissed.<sup>13</sup>

It might be noted that the sale of unlicensed shares of corporate stock, offered in violation of the Illinois Securities Act,<sup>14</sup> gives rise to a cause of action in favor of the purchaser for the recovery of the amount so paid together with attorney's fees,<sup>15</sup> which action would not normally be barred short of five years after the commission of the alleged wrongful act.<sup>16</sup> It was urged, in the case of *Schlossberg v. Chicago Dr. Pepper Bottling Company*,<sup>17</sup> that the seller could short-cut this limitation period by

<sup>10</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 32, § 157.72. The presence of some procedural defects in the statute in question is noted in connection with the comment on the case of *In re Silverman*, 305 N. Y. 13, 110 N. E. (2d) 402 (1953), appearing in 31 CHICAGO-KENT LAW REVIEW 364-8.

<sup>11</sup> See *Opelka v. Quincy Memorial Bridge Co.*, 335 Ill. App. 402, 82 N. E. (2d) 184 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 178.

<sup>12</sup> 349 Ill. App. 229, 110 N. E. (2d) 464 (1953). Leave to appeal has been denied.

<sup>13</sup> The decision also turned on the timeliness of the action. It was held that Ill. Rev. Stat. 1953, Vol. 2, Ch. 83, § 14, containing a one-year limitation, had to be applied and the cause was not saved by anything in Section 24, dealing with stay orders, inasmuch as the cause, if one existed, arose after the injunctive order had been entered.

<sup>14</sup> Ill. Rev. Stat. 1951, Vol. 2, Ch. 121½, § 96 et seq. The statute in question has been repealed and replaced by the Illinois Securities Act of 1953, effective on January 1, 1954: Laws 1953, p. 1329, H.B. 146; Ill. Rev. Stat. 1953, Vol. 2, Ch. 121½, § 137.1 et seq.

<sup>15</sup> *Ibid.*, § 128.

<sup>16</sup> *Ibid.*, § 135.

<sup>17</sup> 350 Ill. App. 166, 112 N. E. (2d) 173 (1953).

making an offer to repurchase, subject to the condition that the same be accepted within a reasonable time, on the theory that if such offer was not so accepted the buyer should be estopped from seeking a recovery under the statute. The court, on the basis of the decision in *Bunge v. Kirchkoff*,<sup>18</sup> held otherwise, but it is worthy of notice that the new statute on the subject expressly sanctions the action taken by the seller on this point.<sup>19</sup>

Aside from noting that shareholders in state banking corporations are no longer to be exposed to super-added liability,<sup>20</sup> attention could be drawn to the fact that not for profit corporations may now be organized to operate telephone services on a mutual or co-operative basis;<sup>21</sup> that the former statute relating to credit unions has been repealed and replaced with a more comprehensive act;<sup>22</sup> and some changes have also been made in statutory law with respect to the operation of community currency exchanges.<sup>23</sup> Even more significant is the fact that considerable enlargement has occurred in the powers granted to unlicensed foreign corporations to loan money on notes or other evidences of indebtedness, to take security interests in real or personal property within the state, and to enforce the same, without becoming liable for those consequences normally attendant upon the transaction of unlicensed business within the state.<sup>24</sup>

#### PRINCIPAL AND AGENT

Perhaps the most startling case during the year in the field of principal and agent, that of *Aldridge v. Fox*,<sup>25</sup> propounded a question as to whether or not a master who is sued under the

<sup>18</sup> 251 Ill. App. 119 (1929).

<sup>19</sup> See laws 1953, p. 1329, H. B. 146, § 13C; Ill. Rev. Stat. 1953, Vol. 2, Ch. 121½, § 137.13(c). The revised statute requires action within thirty days after receipt of an offer to repurchase.

<sup>20</sup> Ill. Const. 1870, Art. XI, § 6, was amended to so provide on November 24, 1952.

<sup>21</sup> Laws 1953, p. 332, S. B. 173; Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 163a3.

<sup>22</sup> Laws 1953, p. 333, H. B. 828; Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 496.1 et seq.

<sup>23</sup> See Laws 1953, p. 985, H. B. 811, and p. 1081, H. B. 251. Ill. Rev. Stat. 1953, Vol. 1, Ch. 16½, §§ 36, 43.1, and 45 are particularly affected.

<sup>24</sup> Laws 1953, p. 1508, H. B. 410; Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 212.

<sup>25</sup> 348 Ill. App. 96, 108 N. E. (2d) 139 (1952). Leave to appeal has been denied. See notes thereon in 31 CHICAGO-KENT LAW REVIEW 277, 41 Ill. B. J. 475, and 29 N. D. L. Rev. 98.

doctrine of *respondeat superior* for a tort committed by his servant could be held liable in damages for a greater amount than that imposed on the servant. The master and servant there concerned were sued under separate counts in the same complaint. Separate verdicts were submitted as to each defendant, without objection, and both the master and the servant were found guilty, but in varying amounts, with the master being held liable for a substantially greater sum than the servant. The master appealed, contending that it would be illogical to hold that a third party, injured by the act of the servant, could be held to have been injured by the master to a greater extent than by the servant through whom, and solely through whom, he had acted. The Appellate Court for the First District did not agree, pointing out that while the liability of master and servant should be deemed consolidated and unified, since a single wrong was committed, the liability was double-faceted in that separate actions could have been instituted, although only one satisfaction could have been obtained. As the master would not be allowed to complain if the one jury had returned a verdict against him for a greater amount than another jury might have returned in a suit against the servant, it was said to follow therefrom that the plaintiff had an election as to which of the two judgments he wished to enforce.

The right of an agent to compensation for his services was considered in the case of *Nicholson v. Alderson*,<sup>26</sup> a real-estate broker's case dealing with a ninety-day exclusive authority to sell the property in question which had been revoked by the principal during the ninety-day period. The court held the broker was not entitled to a stated commission as the broker's authority was revocable at the will of the principal.

The Supreme Court, through its decision in *Glasser v. Essaness Theatres Corporation*,<sup>27</sup> would appear to have joined with other Illinois courts in the trend toward laxity with respect to the agent's fiduciary duties owed to the principal. The case was

<sup>26</sup> 347 Ill. App. 496, 107 N. E. (2d) 39 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 180 and 1953 Ill. L. Forum 137.

<sup>27</sup> 414 Ill. 180, 111 N. E. (2d) 124 (1953), affirming 346 Ill. App. 72, 104 N. E. (2d) 510 (1952).

one in which an agent for a partnership, charged with negotiating with the landlord for a lease of the premises in which the partnership business was carried on, was said not to have breached his fiduciary duty when, following the landlord's refusal to renew the lease, the agent purchased the premises for himself with a view toward conducting therein the business formerly carried on by the partnership. Along much the same line is the case of *Van Houten v. Trust Company of Chicago*<sup>28</sup> wherein the Supreme Court, reiterating principles adopted by it many years ago,<sup>29</sup> pointed out that, after an agency relation has been terminated, the agent is no longer under an obligation to account to the principal for personal gains which would, if gleaned during the existence of the agency relationship, have belonged to the principal. The court also there stressed the fact that, if an agency contract does not provide for a definite time period, it would be terminable at will by the agent and the principal's knowledge of an event from which termination could be inferred would be sufficient notice that termination had occurred.

Of particular concern to lawyers should be another case dealing with the termination of an agent's authority, that of *Fessler v. Weiss*.<sup>30</sup> The attorney there concerned, retained by an insurance company to defend the insured under the terms of an automobile liability policy, had entered his appearance on behalf of the defendant. It was held that the subsequent liquidation of the insurance company because of insolvency did not affect the attorney-client relationship thus created, that primary responsibility was owed to the insured, and the fact that the attorney was to be paid by the insurance company did not detract from his duty to defend the suit, leaving him without power to consent to the entry of a judgment against the client in the absence of express permission from the client.

<sup>28</sup> 413 Ill. 310, 109 N. E. (2d) 187 (1952).

<sup>29</sup> See *Walker v. Carrington*, 74 Ill. 446 (1874).

<sup>30</sup> 348 Ill. App. 21, 107 N. E. (2d) 795 (1952).

## LABOR LAW

After the United States Supreme Court had declared that a state court had the right to inquire into the purposes of picketing, with the further right, if it found that the picketing was being carried on for an unlawful purpose, to enjoin the same whether peaceful or not,<sup>31</sup> it was only a question of time until Illinois courts would make use of the opportunity thus provided to participate in the burial of the doctrine that peaceful picketing, the working man's means of communication, was to be protected under the constitutional guarantee of freedom of speech. The opportunity presented itself in the case of *Bitzer Motor Company v. Local 604, International Brotherhood of Teamsters, etc.*,<sup>32</sup> wherein a union had engaged in peaceful picketing for the sole purpose, so the trial court found, of inducing an employer to enter into a collective bargaining agreement with the union although the employees had expressed a desire not to belong to the union. The Appellate Court, affirming an injunction, declared that the picketing was being carried on for an unlawful purpose in violation of public policy although, until then, the state had not spoken on that subject matter. The public policy so found to exist was said to demand that a workman should be free to join a union or not without interference, restraint or coercion on the part of the employer so, when the union engaged in picketing, it illegally sought to force the employer, and indirectly the employees, into selecting it as the proper collective bargaining representative.

The process of providing judicial interpretation for the Unemployment Compensation Act<sup>33</sup> appears to have made further progress. The definition of "employment" there utilized excludes from its purview services "performed by an individual as an insurance agent or insurance solicitor," if such services are performed solely on a commission basis.<sup>34</sup> In *Commonwealth Insur-*

<sup>31</sup> *Building Service Employees Int'l Union v. Gazzam*, 339 U. S. 532, 70 S. Ct. 784, 94 L. Ed. 1045 (1950); *Int'l Brotherhood of Teamsters v. Hanke*, 339 U. S. 470, 70 S. Ct. 773, 94 L. Ed. 995 (1950); *Hughes v. Superior Court of California*, 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985 (1950).

<sup>32</sup> 349 Ill. App. 283, 110 N. E. (2d) 674 (1953), noted in 41 Ill. B. J. 540.

<sup>33</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 300 et seq.

<sup>34</sup> *Ibid.*, Ch. 48, § 338.



*ance Company v. Board of Review*,<sup>35</sup> the Supreme Court, interpreting this provision, declared that an insurance agent entitled to a fixed minimum weekly advance against future commissions, regardless whether the new business secured or commissions earned in any week equalled the amount so advanced, was to be regarded as a covered employee.<sup>36</sup>

It did, however, in *Parks Cab Company v. Annunzio*,<sup>37</sup> conclude that taxicab drivers operating under a company which owned the taxicab licenses were not its employees for this purpose.<sup>38</sup> The company, unwilling to engage in the actual ownership and operation of the taxicabs, leased its licenses at a stated weekly rental to persons who owned cabs, although it did maintain a garage for the convenience of the drivers on a purely voluntary basis.<sup>39</sup> A claim that the actual relationship which existed between the parties had received a different color under the city ordinance regulating taxicabs, operating to make the license holder the actual operator, was shrugged off with a declaration that the Unemployment Compensation Act dealt with economic realities and should be interpreted in the light thereof.<sup>40</sup>

Those same economic realities appear to have influenced the decision in the case of *Grand Leader Department Store, Inc. v.*

<sup>35</sup> 414 Ill. 475, 111 N. E. (2d) 345 (1953).

<sup>36</sup> The Supreme Court did, however, decline to hold that the exclusion from coverage was intended to be limited to agents who sold new insurance exclusively. It emphasized the idea that the broad phraseology of exclusion would encompass those agents who collected premiums in a territory or "debit" allocated to them on a commission basis, apart from their efforts in securing new business. This last point seems rather doubtful in view of holdings elsewhere to the effect that so-called "industrial" agents are to be regarded as employees whereas those exclusively engaged in selling new insurance are usually considered to be independent contractors: *Amstutz v. Prudential Ins. Co. of America*, 136 Ohio St. 404, 26 N. E. (2d) 454 (1940).

<sup>37</sup> 412 Ill. 549, 107 N.E. (2d) 853 (1952).

<sup>38</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, §§ 314 and 316.

<sup>39</sup> Each license lessee agreed to be responsible for property damage, to report all accidents to the company, to bear the cost of operating expenses and repairs, and to transfer title to his cab to the company for security purposes. The company agreed, in return, to carry insurance, but did not exercise any control over the operation of the cabs.

<sup>40</sup> These economic factors, in the court's opinion, were of greater importance than contrary decisions from other jurisdictions which appear to have attached greater significance to franchise ordinances: *Redwine v. Wilkes*, 83 Ga. App. 645, 64 S. E. (2d) 101 (1951); *Kaus v. Unemployment Compensation Comm'n*, 230 Iowa 860, 299 N. W. 415 (1941); *Radley v. Commonwealth*, 297 Ky. 830, 181 S. W. (2d) 417 (1944).

*Department of Labor*,<sup>41</sup> a case in which a corporation, lessee of a store building but not engaged in selling any merchandise therein, had entered into a number of sub-leases with divers parties as concessionaires for the sale, by them, of various types of merchandise. Within fixed limits,<sup>42</sup> each concessionaire conducted his business according to his own wishes, hired and fired his own employees, fixed their pay, and administered all the matters incident thereto. When a question arose as to whether the lessor-corporation could be deemed to be an employer under the act, no concessionaire having the requisite six employees to make him liable for contributions, the Supreme Court overruled both the Department of Labor and the lower court as it reached the conclusion that it was not such, particularly since the individual concessionaires conducted their several businesses at their own risk and expense.

One other case dealing with coverage deserves mention. The issue in *Scripture-Press Foundation v. Annunzio*<sup>43</sup> was whether the services were performed in the employ of a corporation "organized and operated exclusively for religious . . . or educational purposes."<sup>44</sup> The Director of Labor had ruled that the not-for-profit corporation there concerned, which had been organized for the primary purpose of producing, distributing, and selling of religious literature and supplies, was not exempt since its sales produced substantial profits which had been accumulated in a surplus account. The Supreme Court, siding with the Director, pointed to the fact that nothing in the articles of incorporation or the by-laws required the transfer of the assets, upon dissolution, to an exclusively religious organization but left it to the unfettered discretion of the corporation to determine the manner of distribution. As a consequence, it was said the corporation could not be regarded as one operated exclusively for religious or educational purposes.

<sup>41</sup> 415 Ill. 110, 112 N. E. (2d) 461 (1953).

<sup>42</sup> The concession leases contained elaborate provisions not only with respect to the method of calculating rent but also with regard to many details for regulating the operation of each concession.

<sup>43</sup> 414 Ill. 339, 111 N. E. (2d) 519 (1953).

<sup>44</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 331.

Matters concerning the right to unemployment compensation benefits also came up for consideration. In one case, that of *Robert S. Abbott Publishing Company v. Annunzio*,<sup>45</sup> the question was whether a claimant who, in the first instance, was ineligible for benefits because his original unemployment was due to a labor dispute,<sup>46</sup> would later become entitled to compensation when the employer's plant had resumed full operation and the claimant had been permanently replaced. The Supreme Court answered the question in the affirmative, pointing out that, once full production had been resumed, the unemployment was no longer due to a work stoppage. In the case of *Illinois Bell Telephone Company v. Board of Review*,<sup>47</sup> however, a married woman who had left her employment in order to accompany her husband to a distant city, where he had secured a job, was declared unavailable for work due to "marital circumstances" as defined in the statute.<sup>48</sup> Contrary to the holding of the administrative agency, the court also declared that the various situations enumerated in the statutory list of reasons for unavailability were not mutually exclusive, so the existence of any one ground would be enough to prevent eligibility for benefits.<sup>49</sup>

Two cases deal with the employment relation in a narrower sense. In one of them, that of *Stein v. Isse Koch & Co., Chicago, Inc.*,<sup>50</sup> it was held that where an employee, during his service in the armed forces, was to receive commissions from his employer on all merchandise sold in his territory by a substitute selected by him, the agreement was not one terminable at will, but was to run for the period of the employee's service in the armed forces,

<sup>45</sup> 414 Ill. 559, 112 N. E. (2d) 101 (1953), noted in 31 CHICAGO-KENT LAW REVIEW 376.

<sup>46</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 434.

<sup>47</sup> 413 Ill. 37, 107 N. E. (2d) 832 (1952).

<sup>48</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 420(c) (5).

<sup>49</sup> The case of *Stricklin v. Annunzio*, 413 Ill. 324, 109 N. E. (2d) 183 (1952), adds to the interpretation provided by the earlier holding in *Mohler v. Department of Labor*, 409 Ill. 79, 97 N. E. (2d) 762, 24 A. L. R. (2d) 1393 (1951). The case dealt with a coal miner who, because of physical inability, discontinued work in the mines, accepted retirement benefits from his union, and made twelve applications for work during the ensuing period of seven months, but none prior to the filing of a claim for unemployment compensation, who was said not to be actively seeking labor, was unavailable for work, and not entitled to benefits.

<sup>50</sup> 350 Ill. App. 171, 112 N. E. (2d) 491 (1953).

thereby operating to prevent the employer from terminating the relationship prior to the employee's discharge from military duty. In the other, that of *Cummings v. Chicago, Aurora & Elgin Railway Company*,<sup>51</sup> an employee who had worked without an agreement as to the duration of his employment was said not to be entitled to any damages for breach of the employment contract when not rehired following a suspension of employment because of a strike as the hiring was one terminable at will. The result was reached despite the fact that the employee had been notified the suspension was to last only until operations could be resumed.

Two slight modifications in statutory law were made by the legislature. Under one of them, the Director of Labor is permitted to grant emergency permits for the employment of women in certain occupations in excess of the hours designated in the pertinent statute,<sup>52</sup> and for other persons in excess of six days a week, until the termination of the national emergency.<sup>53</sup> By the other, the Industrial Home Work Law has been amended to classify the items which may be produced thereunder.<sup>54</sup>

#### WORKMEN'S COMPENSATION

Case law on the subject of workmen's compensation produced little of importance,<sup>55</sup> the only significant holding being that attained in *Todd School for Boys v. Industrial Commission*.<sup>56</sup> A private boarding school there provided its students with academic instruction and also furnished practical experience in agriculture, aviation, sailing, and other activities. Older students usually supervised the younger ones in these activities and, in addition, performed tasks of a menial nature. An older student took a group of youngsters on a bus excursion trip arranged by the school

<sup>51</sup> 348 Ill. App. 537, 109 N. E. (2d) 378 (1952).

<sup>52</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 5 et seq.

<sup>53</sup> Laws 1953, p. 1017, H. B. 813; Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 8.1.

<sup>54</sup> Laws 1953, p. 1880, S. B. 540; Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 251.

<sup>55</sup> See post, Civil Practice and Procedure, under the topic Appeal and Appellate Procedure, notes 73 to 76, for a discussion of the case of *Quitman v. Chicago Transit Authority*, 348 Ill. App. 481, 109 N. E. (2d) 373 (1952), where it was held that the declaration of unconstitutionality laid down in *Grasse v. Dealers Transport Co.*, 412 Ill. 179, 106 N. E. (2d) 124 (1952), was available to aid in the solution of another case then pending on appeal before an appellate court.

<sup>56</sup> 412 Ill. 453, 107 N. E. (2d) 745 (1952).

and met with a serious accident. He claimed workmen's compensation from the school on the theory that, as he rendered services, he was an employee, especially since he did not pay full tuition rates. The Supreme Court indicated that he could not be considered to be an employee since the various tasks assigned to him and to the others formed a part of the educational program and were performed by all students regardless of the rate of tuition paid.

Amendments to the Workmen's Compensation Act<sup>57</sup> and the Occupational Diseases Act<sup>58</sup> have become a regularly recurring feature at each session of the general assembly and the most recent session did not prove to be an exception. One amendment, made necessary because of the holding in the case of *Grasse v. Dealers Transport Company*,<sup>59</sup> now provides that if a covered employee suffers injury or death through the negligence of a third person, he or his personal representative may initiate proceedings against such third person, notwithstanding the employer's liability to pay workmen's compensation.<sup>60</sup> Another operates to exclude members of the police department of cities having more than 200,000 inhabitants from coverage under the Act.<sup>61</sup> A third extends the time period to two years, formerly one year, within which the death of an employee, attributable to an accidental injury, will entitle his dependents to claim compensation.<sup>62</sup> Still other amendments increase the rate of compensation<sup>63</sup> or provide for lump sum payment arrangements in the event compensation becomes payable to a widow or to a widow and one or more children.<sup>64</sup> Substantially the same changes and additions have been made in the Occupational Diseases Act.<sup>65</sup>

<sup>57</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.1 et seq.

<sup>58</sup> *Ibid.*, Ch. 48, § 172.36 et seq.

<sup>59</sup> 412 Ill. 179, 106 N. E. (2d) 124 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 375.

<sup>60</sup> Laws 1953, p. 667, H. B. 985; Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.5(b).

<sup>61</sup> Laws 1953, p. 1552, H. B. 807; Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.1(b)(1).

<sup>62</sup> Laws 1953, p. 667, H. B. 985; Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.6(c).

<sup>63</sup> Laws 1953, p. 667, H. B. 985. The sections affected are to be found in Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, §§ 138.7 and 138.8.

<sup>64</sup> See particularly Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.7(g), as amended by Laws 1953, p. 667, H.B. 985.

<sup>65</sup> Laws 1953, p. 683, H.B. 986. The provision makes changes in Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, §§ 172.40 to 172.43, inclusive.

## PARTNERSHIPS

It is not often that courts of appeal are called upon to decide questions of partnership law<sup>66</sup> but the recent case of *Woerter v. Labowitch & Morris Discount Service*<sup>67</sup> is noteworthy for the Appellate Court there found it necessary to reiterate the fundamental rule that a partnership is not a legal entity apart from the individual members. As a consequence, it declared a judgment by confession to be void wherein only the partnership, by its trade name, had been made defendant.

A more subtle question was involved in the case of *Dunbar v. Olson*<sup>68</sup> wherein the plaintiff had supplied labor and material to the driller of an oil well in which the appellants had fractional interests. In denying the plaintiff's claim that the appellants were partners with the driller, the Appellate Court pointed out that the existence of a mining partnership could not be proved merely by showing joint ownership of the property. Joint working and joint operation of the property were also essential.

Cases involving joint adventures are also rare, although principles of partnership law are often relied on therein because of the many similarities found present. One point of distinction has been made, however, and that relates to the ability of one joint adventurer, especially in a noncommercial or nontrading arrangement, to execute or endorse negotiable paper.<sup>69</sup> The case of *Roe v. Cooke*,<sup>70</sup> while recognizing the distinction, appears to have reached the conclusion that a prior course of conduct by the joint adventurers may have been such as to become the basis for an inference that one of the adventurers had express authority so to

<sup>66</sup> The case of *Grand Leader Department Store, Inc. v. Department of Labor*, 415 Ill. 110, 112 N. E. (2d) 461 (1953), discussed above under the topic of Labor Law, note 41, is interesting even though the court there, for purpose of unemployment compensation contributions, reached the conclusion that no partnership or joint enterprise existed between the parties. Certain leasing arrangements come perilously close to partnerships, particularly where the "landlord" exercises a degree of control over the operations of the "tenant."

<sup>67</sup> 348 Ill. App. 168, 108 N. E. (2d) 519 (1952). Leave to appeal has been denied.

<sup>68</sup> 349 Ill. App. 308, 110 N. E. (2d) 664 (1953). See also the companion case of *Dunbar v. Dally*, 349 Ill. App. 314, 110 N. E. (2d) 667 (1953).

<sup>69</sup> See, for example, *Teed v. Parsons*, 202 Ill. 455, 66 N. E. 1044 (1903), and *Ulery v. Ginrich*, 57 Ill. 531 (1871).

<sup>70</sup> 350 Ill. App. 183, 112 N. E. (2d) 511 (1953). Leave to appeal has been denied.

do. In that case, a check in final settlement of a debt due the adventurers, made payable to one of them and paid on his endorsement, was held to be a discharge of the debt even though the other adventurer was not given his share of the proceeds.

## II. CONTRACTS

As often happens, no cases of novelty or importance were decided in the field of general contract law during the present survey year nor, for that matter, were any opinions rendered bearing directly upon such specialized contractual topics as negotiable instruments and suretyship. Other related areas did, however, receive some attention.

### INSURANCE

Statutory construction was called for in the case of *Landis, for use of Talley v. New Amsterdam Casualty Company*.<sup>1</sup> One Peters owned and operated a garage and employed one Landis. The insurance company had issued a certificate to Peters, which he had filed with the appropriate state department, showing the existence of a motor vehicle liability policy complying with the requirements of Section 16 of the Illinois Truck Act.<sup>2</sup> Landis, while operating a truck with permission from Peters, temporarily abandoned his employer's business, made a personal trip to certain taverns, and thereafter injured Talley, who recovered a judgment against Landis for a substantial sum. A garnishment action was then instituted against the insurance company and it defended on the ground the policy in question lacked an "omnibus" clause under which it might have been held liable. The Appellate Court for the Second District, however, adopted by reference the "omnibus" clause of the financial responsibility law<sup>3</sup> and allowed recovery in the garnishment action to the extent provided for by statute. Lacking express precedent in Illinois on the point, the court nevertheless conceived it to be the apparent legislative intent

<sup>1</sup> 347 Ill. App. 560, 107 N. E. (2d) 187 (1952). Leave to appeal has been denied.

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 253.

<sup>3</sup> Ibid., Ch. 95½, § 58k.

to provide for coverage to all persons using motor vehicles with the express or implied consent of the insured. Since Landis, as driver, had initial permission to use the truck, his subsequent use thereof was construed to be one with permission of the insured. On that theory, he became an additional insured.

Of limited interest, but of importance to owners and operators of truck "fleets," as well as to underwriters, is the case of *National Auto Underwriters Association v. Day*.<sup>4</sup> It would appear that "fleet" insurance rates may, by statute, be lower than rates on a few cars.<sup>5</sup> For over twelve years, the Director of Insurance had construed the pertinent statute to mean that the insured had to own the "fleet" automobiles to get the benefit of the reduced rate and not merely have management or central control over automobiles owned by others. At the instance of Greyvan Lines, an organization of individual truck owners banded together for business purposes under one management, the Director conducted hearings and promulgated new rulings extending the benefit of the statute to groups of the character mentioned. This action was upheld on the basis that any attempt to discriminate between owned "fleets" and those separately owned but managed in common failed to give proper interpretation and effect to the statute.

A common incident, but with unusual results, was involved in the case of *Hawthorne v. Frost*.<sup>6</sup> It appeared that a taxicab driver, when negligently backing his cab, had caused the bumper thereof to become engaged with that on plaintiff's car. The two drivers alighted and the taxicab driver then assaulted the plaintiff without provocation. After recovering judgment against the driver and the cab owner, plaintiff endeavored, by garnishment, to reach the proceeds of an automobile liability policy but was met, in the trial court, with the contention that the policy, issued as required by law,<sup>7</sup> covered only injury or death resulting from negligence

<sup>4</sup> 348 Ill. App. 554, 109 N. E. (2d) 630 (1952). Leave to appeal has been denied.

<sup>5</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 73, § 1065.3, defines a "fleet" as being five or more motor vehicles, all owned by one insured or all under one general management and used principally for business purposes.

<sup>6</sup> 348 Ill. App. 279, 108 N. E. (2d) 816 (1952), noted in 51 Mich. L. Rev. 939.

<sup>7</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 59.



in the operation of the cab, so the garnishment action was dismissed. On appeal, the Appellate Court for the First District noted that this contention had some support in two earlier Supreme Court decisions,<sup>8</sup> but said the statements therein were dicta, as the factual situations were not truly identical, and that the modern trend elsewhere was opposed to the claims of the garnishee. As the jury, by special interrogatory, had found the assailant to be "operating" the cab at the time, the policy was held to be broad enough to cover injury arising from "wilful" as well as "accidental" negligence on the part of the insured or his agent.

#### QUASI-CONTRACTS

One case with quasi-contractual aspects is worthy of notice, not so much for what was done but for what was said there. In *Borrowdale v. Sugarman*,<sup>9</sup> the plaintiff filed a two-count complaint, the first count being as in special assumpsit on four separate express contracts of employment and the second, as in general assumpsit, for the reasonable worth of services performed. At the close of the plaintiff's case, the defendant moved to compel the plaintiff to elect the one cause on which the case should proceed, but this motion was denied. The verdict, and the accompanying judgment, were based on the first count as the trial judge noted that "without any question it [the verdict] was not based on a *quantum meruit*." Nevertheless, the Appellate Court took occasion to note that there could not be both an express and an implied agreement in reference to the same matter, relying on some striking phraseology used by the Supreme Court in the early case of *Walker v. Brown*.<sup>10</sup> The court did not, however, appear to notice that, even though there might be an express contract on the point, it would still be possible, after full performance thereof, to maintain a suit, as in general assumpsit, on an

<sup>8</sup> See *Weksler v. Collins*, 317 Ill. 132, 147 N. E. 797 (1925); *People v. Kastings*, 307 Ill. 92, 138 N. E. 269 (1923).

<sup>9</sup> 347 Ill. App. 390, 107 N. E. (2d) 45 (1952).

<sup>10</sup> 28 Ill. 378 (1862). Breese, J., at p. 383, stated: "As in physics, two solid bodies cannot occupy the same space at the same time, so in law and common sense, there cannot be an express and an implied contract for the same thing, existing at the same time."

*indebitatus* count, although the express contract rate would regulate the amount of the recovery.<sup>11</sup> The situation is one of the few instances where, in law, two bodies can occupy the same space at the same time.

#### SALES

Two judicial decisions arising during the year dealt with aspects of the law of sales. One case, that of *Bangert v. Emmco Insurance Company*,<sup>12</sup> reiterated old principles with respect to the right of a conditional vendor of a chattel to regard the same at the buyer's risk from the time of delivery and to repossess in case of default without obligation to restore the status quo, but did deal with a new point with respect to the seller's duty, in case of destruction or damage, to make a bona fide settlement with any insurer so as not to minimize the buyer's interest or to enhance his debt for the balance due. The evidence was, to some degree, in conflict but as a jury could have found that the conditional seller had wrongfully settled the insurance claim for less than a fair amount, the case was ordered retried. In the other, that of *Duncan v. Martin's Restaurant, Inc.*,<sup>13</sup> the court ruled that a woman who became ill, and bore a child prematurely, due to the eating of unwholesome food in a restaurant, could recover from the owner thereof for those damages in the form of pain and mental anguish suffered as the result of the miscarriage, but was not entitled to any recovery for anguish of mind, wholly sentimental, caused by the loss of the child.

Legislative action in the field is to be observed in that a new statute has been passed which prohibits, under penalty, the advertising of auction sales unless the bidding is open to the general public;<sup>14</sup> the penalty for violating the provisions of the statute dealing with the sale of paints, oils, and other compounds has been increased;<sup>15</sup> and the Trust Receipts Act has been modified to make

<sup>11</sup> *Sands v. Potter*, 165 Ill. 397 at 407, 46 N. E. 282 at 285, 56 Am. St. Rep. 253 (1897).

<sup>12</sup> 349 Ill. App. 257, 110 N. E. (2d) 528 (1953).

<sup>13</sup> 347 Ill. App. 183, 106 N. E. (2d) 731 (1952). Leave to appeal has been denied.

<sup>14</sup> Laws 1953, p. 1654, H.B. 105; Ill. Rev. Stat. 1953, Vol. 2, Ch. 121½, § 219.1.

<sup>15</sup> Laws 1953, p. 907, H.B. 686; Ill. Rev. Stat. 1953, Vol. 2, Ch. 121½, § 95.

it a felony for a trustee to wilfully and wrongfully fail to pay over the amount due under a trust receipt in violation of the duty to account or arising by means of an unauthorized dealing with the property covered thereby.<sup>16</sup> Even more thorough was the complete revision made in the Securities Act which followed right on the heels of an attack upon the constitutionality of the old statute on the ground the provisions thereof were so vague as to violate the federal and state due process clauses. Although the Supreme Court, in *Jaffee v. Cruttenden*,<sup>17</sup> repelled the attack so made, the former law was repealed and replaced by a new codification,<sup>18</sup> one designed to become effective on January 1, 1954.

### III. CIVIL PRACTICE AND PROCEDURE

#### AVAILABILITY OF REMEDIES

While the legislature failed to take action to the end that the people might have a chance to modernize the judicial article of the state constitution,<sup>1</sup> the year did uncover some points with respect to the authority and powers of existing courts.<sup>2</sup> For example, the possibility of conflict between an Illinois circuit court, acting to control custody in connection with a divorce proceeding,<sup>3</sup> and an Illinois county court, sitting in a juvenile delinquency matter,<sup>4</sup> was brought to the fore by the original petition for habeas corpus filed in the Supreme Court in the case entitled

<sup>16</sup> Laws 1953, p. 389, H.B. 44; Ill. Rev. Stat. 1953, Vol. 2, Ch. 121½, § 183.1. The provision appears to have been adopted to offset the holding in *People v. Levin*, 412 Ill. 11, 104 N. E. (2d) 814 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 387. The statute there construed was repealed and replaced by the measure in question.

<sup>17</sup> 412 Ill. 606, 107 N. E. (2d) 715 (1952).

<sup>18</sup> Laws 1953, p. 1329, H.B. 146; Ill. Rev. Stat. 1953, Vol. 2, Ch. 121½, § 137.1.

<sup>1</sup> See Zacharias, "The Proposed Illinois Judicial Article," 30 CHICAGO-KENT LAW REVIEW 303-38 (1952).

<sup>2</sup> The mandatory requirement establishing probate courts in counties having a population of a designated figure or more has been amended so as to increase the population factor, but existing courts are not disturbed and opportunity still remains to organize other such courts in areas where the local inhabitants may desire to vote to establish the same: Laws 1953, p. 113, S.B. 175; Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 299 et seq. The population factor has been increased from 85,000 to 125,000. Counties having populations between 75,000 and 125,000 may vote on the point.

<sup>3</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, § 19.

<sup>4</sup> *Ibid.*, Ch. 23, § 190 et seq.

*People ex rel. Houghland v. Leonard*,<sup>5</sup> but the court resolved the possible conflict by holding that custodial rights based on a divorce decree had to yield before the superior right of the state, as *parens patriae*, over the dependent and delinquent youth.<sup>6</sup> The customary principle that, when courts of concurrent jurisdiction exist,<sup>7</sup> the one which first takes jurisdiction shall retain the same without interference by the other was there held to be inapplicable.

Limitations on the jurisdictional power of courts to hear and determine causes being what they are, the result achieved in the case of *Adams v. Holland*<sup>8</sup> is not a surprising one even though the parties appear to have attempted a common-sense solution of their dispute. The case began with a suit in the circuit court to contest a will previously admitted to probate before a probate court.<sup>9</sup> The contestant was a legatee under both the admitted will and an earlier one but stood to gain no more than a certain grandfather clock if the admitted will was rejected and the older will established in its place.<sup>10</sup> The defendants, by counterclaim, sought to force on the contestant the advantage he stood to gain from a successful contest, with a view toward dismissal of the will contest, but he resisted and the counterclaim was ordered stricken. The order was affirmed on the ground the probate court had exclusive jurisdiction over the estate and its personal assets, hence the circuit court had no power to entertain the counterclaim as its authority was limited to determining the validity of the will and nothing more.

Although the Supreme Court did nothing to settle the controversy regarding the power of an Illinois judge, after appointment

<sup>5</sup> 415 Ill. 315, 112 N. E. (2d) 697 (1953).

<sup>6</sup> See also the new Youth Commission Act, Laws 1953, p. 620, S.B. 276, Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 220d.1 et seq., which creates a Youth Commission to receive persons committed to it under *ibid.*, Ch. 23, § 190.

<sup>7</sup> Juvenile proceedings may be filed in either the circuit or the county court of the county: Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 191.

<sup>8</sup> 348 Ill. App. 320, 108 N. E. (2d) 815 (1952). Leave to appeal has been denied.

<sup>9</sup> See Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 242.

<sup>10</sup> The opinion does not so indicate, but it can only be supposed that there were other discrepancies between the two wills in favor of other parties, for the cost of suit and appeal would seem to outweigh the material benefit to be gained by the contestant, much as he may have been interested in vindicating jurisdictional principles.

to the Appellate Court, to grant rehearing in a case determined by his predecessor,<sup>11</sup> it did clarify one issue of particular importance to Cook County, but also of significance in other counties where probate courts exist, having to do with the filling of a vacancy caused by the death of the incumbent judge. By means of an original petition in mandamus<sup>12</sup> presented in the case of *People ex rel. Gregg v. Tauchen*,<sup>13</sup> it was determined that a clerk of a probate court has the power to make necessary temporary appointments to the bench,<sup>14</sup> at least until the vacancy is filled by a proper special election or by appointment of the governor,<sup>15</sup> and that the one so temporarily appointed does not succeed to the office of probate judge but serves only pursuant to the terms of the designation and call so made.

Acquisition of jurisdiction over the parties is about as important to litigation as the presence of a court empowered to hear and determine the cause. In that connection, upon issuance, the summons should be placed with the sheriff or other person authorized to serve the same to the end that notice may be promptly given and jurisdiction acquired.<sup>16</sup> As a corollary thereto, upon failure to secure service, an alias writ is authorized,<sup>17</sup> which alias is normally in the same form as the original except for necessary changes in dates. The holding in the case of *Department of Public Works and Buildings v. Lauter*<sup>18</sup> now indicates that defects in the original summons, tending to make the same invalid, may be corrected at the time the alias is issued, as the prime jurisdictional fact today is the filing of the complaint and not, as was once the case, the issuance of a valid writ.<sup>19</sup>

<sup>11</sup> See *Glasser v. Essaness Theatres Corp.*, 346 Ill. App. 72, 104 N. E. (2d) 510 (1952), commented on in 31 CHICAGO-KENT LAW REVIEW 187, and the action taken, on leave to appeal, as noted in 414 Ill. 190, 111 N. E. (2d) 124 (1953).

<sup>12</sup> Filed pursuant to Ill. Const. 1870, Art. VI, § 2.

<sup>13</sup> 415 Ill. 91, 112 N. E. (2d) 94 (1953).

<sup>14</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 325.

<sup>15</sup> See Ill. Const. 1870, Art. VI, § 32.

<sup>16</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 259.3.

<sup>17</sup> *Ibid.*, Ch. 110, § 259.5.

<sup>18</sup> 413 Ill. 581, 110 N. E. (2d) 179 (1953).

<sup>19</sup> The case reflects a common practice on the part of some attorneys to place the summons, after issuance by the clerk, in the office file and to forget to deliver the same for service until after the writ has expired. Even more reprehensible

Since service is also necessary, it is worthy of note that provisions for substitute service of process on non-resident motorists who become involved in accidents while driving within the state have generally been vindicated on the so-called "agency" theory,<sup>20</sup> under which the non-resident is deemed, either actually or impliedly, to appoint a designated public official as agent for purpose of service of process. Extension of the doctrine to resident motorists who subsequently depart from the state<sup>21</sup> would, seemingly, also follow along the same line, so the action of the Appellate Court for the Third District, in the case of *Ogdon v. Gianakos*,<sup>22</sup> by refusing to give retroactive effect to the new provision, thereby denying validity to a substituted service on a former resident who was involved in an accident prior to the date of the amendment to the statute but who left some time thereafter, would appear to be the only logical one to take, for the appointment of an agent, if one was made, had to come at the time the resident drove his car. The Supreme Court, however, on leave to appeal granted, but not in the period of this survey, came to an opposite conclusion when it declared the service provision to be merely procedural in character and regarded it as controlling with respect to a service made after the amendment.<sup>23</sup> To justify this result, the court took the position that substitute service did not depend on consent but rested more nearly upon a legislative declaration made in the exercise of the police power. Sound as this theory may be with respect to a citizen who remains domiciled within the state, or who maintains a point of contact with its laws although physically absent,<sup>24</sup> in which cases it might well be said that state

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appears to have been the conduct of the attorney for the petitioner, as reported therein, in changing the return dates, after issuance, so as to give the original summons an appearance of validity which it did not possess. Such conduct smacks of contempt of court at least, even if not of forgery: Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 277.

<sup>20</sup> *Hess v. Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927). Justice Butler there pointed out that the difference between "formal and implied appointment is not substantial."

<sup>21</sup> Laws 1949, p. 1134; Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 23.

<sup>22</sup> 348 Ill. App. 576, 109 N. E. (2d) 628 (1953).

<sup>23</sup> See 415 Ill. 591, 114 N. E. (2d) 686 (1953).

<sup>24</sup> *Glineberg v. Evans*, 341 Ill. App. 332, 93 N. E. (2d) 520 (1950), abstr. opin. See also *Rawstorne v. Maguire*, 265 N. Y. 204, 192 N. E. 294 (1934).

power could be applied, the expression seems strained when applied to one who, by departing and establishing a domicile elsewhere, has indicated that he no longer considers himself bound by the power of the state, especially with respect to any future exercise thereof.<sup>25</sup>

One not properly served might, nevertheless, confer jurisdiction over his person by voluntary appearance. It would have been thought that the old technical quiddities with respect to special, as opposed to general, appearance had been banished by the 1945 revision of Section 20 of the Civil Practice Act,<sup>26</sup> but the argument was made, in the case of *Sutton v. Hole*,<sup>27</sup> that a non-resident corporate defendant had submitted to the jurisdiction of an Illinois court because the special and limited appearance which accompanied a motion to quash the service of summons was signed in its behalf by a firm of local attorneys. The court very properly held that the point was without merit.<sup>28</sup>

Some minor issues with respect to periods of limitation controlling the institution of suits were also settled during the year. In *Fourt v. DeLazzer*,<sup>29</sup> for example, it was held that the recently enacted limitation with respect to dram shop suits<sup>30</sup> was retroactive as well as prospective in operation, hence applied to a cause of action which had arisen before the passage thereof. A saving clause as to suits by receivers or trustees in bankruptcy<sup>31</sup>

<sup>25</sup> The Supreme Court does not appear to have given consideration to the decision in *Sanders v. Paddock*, 342 Ill. App. 701, 97 N. E. (2d) 600 (1951), noted in 29 CHICAGO-KENT LAW REVIEW 359. The holding therein must, however, now be considered discredited.

<sup>26</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 144.

<sup>27</sup> 349 Ill. App. 219, 110 N. E. (2d) 455 (1953).

<sup>28</sup> It also indicated that any authority contained in Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 140, specifying the manner of personal service of process outside of the state, had to be considered in the light of the limitation expressed in Section 138 thereof, and consequently had to be confined for use only in connection with actions "affecting property or status" within the jurisdiction. Constructive service in *in personam* actions was, therefore, held defective.

<sup>29</sup> 348 Ill. App. 191, 108 N. E. (2d) 599 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 273.

<sup>30</sup> Laws 1949, p. 816; Ill. Rev. Stat. 1953, Vol. 1, Ch. 43, § 135.

<sup>31</sup> 11 U. S. C. A. § 29 provides for a two-year extension from the date of adjudication in bankruptcy on "any claim against which the period of limitation . . . had not expired at the time of the filing of the petition in bankruptcy."

was, in *Schmidt v. Crowell-Collier Publishing Company*,<sup>32</sup> held inapplicable to a suit brought by a minority shareholder on behalf of his insolvent corporation for defamation occurring subsequent to the adjudication, as a consequence of which the regular one-year limitation<sup>33</sup> was held to be controlling. Difficulty in distinguishing whether the case was one for personal injury based on negligence, in which event the two-year statute would control,<sup>34</sup> or was for breach of an implied warranty of fitness of food for human consumption, to which a five-year limitation would attach,<sup>35</sup> formed the basis for the appeal in the case of *Seymour v. The Union News Company*.<sup>36</sup> The court, on finding that the claim for damages included elements for medical and hospital bills, as well as loss of earnings, treated the action as one for personal injuries, falling within the shorter of the two periods. There is occasion to doubt the validity of the reasoning there relied on, for the measure of recovery in the food cases is not limited to the difference in value between food as warranted and food as supplied but may include a consideration of special circumstances.<sup>37</sup>

Although the case of *Stephens v. Kasten*<sup>38</sup> held constitutional those provisions of Section 64 of the Civil Practice Act regulating the time and manner for demanding trial by jury,<sup>39</sup> the court did there indicate that, in the interest of preserving the cherished right to jury trial, the court should exercise a reasonable discretion when passing upon belated requests for the granting thereof. Absence of such a request became the critical point in the case of *Vail, Mills & Armstrong v. City of Paris*,<sup>40</sup> for it was there held that the grant of additional time in which to plead did not im-

<sup>32</sup> 349 Ill. App. 229, 110 N. E. (2d) 464 (1953). Leave to appeal has been denied.

<sup>33</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 83, § 14.

<sup>34</sup> *Ibid.*, Ch. 83, § 15.

<sup>35</sup> *Ibid.*, Ch. 83, § 16.

<sup>36</sup> 349 Ill. App. 197, 110 N. E. (2d) 475 (1953).

<sup>37</sup> See, for example, *Ryan v. Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105, 74 A. L. R. 339 (1931), where, in an action for breach of warranty, plaintiff was permitted to recover for the physical injury sustained at the time of consuming bread containing a pin.

<sup>38</sup> 383 Ill. 127, 48 N. E. (2d) 508 (1943).

<sup>39</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 188.

<sup>40</sup> 344 Ill. App. 590, 101 N. E. (2d) 861 (1951).



pliedly extend the time in which to file a jury demand. The still more recent case of *Roszell v. Gniadek*<sup>41</sup> now throws additional light on the subject for while it agrees with the view that a mere extension of time in which to plead does not enlarge the period in which to demand jury trial it does illustrate the practice to follow in making the late request. Frankness on the part of the movant, by way of explanation for the earlier failure to act, appears to have played no small part in influencing the discretionary result attained.

While on the subject of jury trial, it might be here noted that the constitutional guarantee with respect to trial by jury,<sup>42</sup> once confined to those cases wherein jury trial would have been proper according to the course of the common law,<sup>43</sup> has been extended, by other constitutional language, to eminent domain proceedings, at least where the just compensation for private property taken is to be made by others than the state itself. The absence of specification as to the manner of trial to be followed when the state acts to condemn was, however, in the case of *Department of Public Works and Buildings v. Kirkendall*,<sup>44</sup> made the basis for a determination that the state has no constitutional right to demand a jury trial. Unless the legislature provides otherwise, it would also seem to follow that the private owner would, in such situations, likewise be denied the right to trial by jury.

Issues concerning the proper parties to litigation came before the court in several instances.<sup>45</sup> So far as parties plaintiff are concerned, the case of *Miller v. First Granite City National Bank*<sup>46</sup> deserves notice for, while the outcome was undoubtedly correct, since the plaintiffs suing there constituted only a part of the membership of an unincorporated union, the inference might be

<sup>41</sup> 348 Ill. App. 341, 109 N. E. (2d) 222 (1952).

<sup>42</sup> Ill. Const. 1870, Art. II, § 5. See also Ill. Const. 1870, Art. II, § 13, and Ill. Rev. Stat. 1953, Vol. 1, Ch. 47, § 1, which contains almost identical language.

<sup>43</sup> *Johnson v. Joliet & Chicago Railroad Co.*, 23 Ill. 124 (1859).

<sup>44</sup> 415 Ill. 214, 112 N. E. (2d) 611 (1953).

<sup>45</sup> A person seeking to change his name by judicial proceedings may now include the spouse and any adult unmarried children, as well as minor children, as parties to the petition under Laws 1953, p. 1279, H.B. 635. See also Ill. Rev. Stat. 1953, Vol. 2, Ch. 96, § 1 et seq.

<sup>46</sup> 349 Ill. App. 347, 110 N. E. (2d) 651 (1953).

drawn from some language in the opinion that the only persons entitled to sue upon a deposit contract existing between the union and the bank would be those who, as authorized signatories, had made the contract or who possessed the power of withdrawal. The extreme difficulty evident in state practice with respect to suits by or against unions calls for legislative attention to the matter. In much the same way, in the case of *Southerland v. Copeland*,<sup>47</sup> it was held proper to dismiss a suit brought by certain so-called "trustees" of an unincorporated voluntary association, designed to recover for damage done to property which belonged to the entire membership, because of the absence of any allegation showing the existence of a trust.

One interesting issue arose concerning the right to conduct representative suits. Certain telephone subscribers, in *Burke v. Illinois Bell Telephone Company*,<sup>48</sup> sued on behalf of themselves and all other subscribers in a designated area to obtain a refund of a charge made for directory service on the ground the utility had wilfully neglected to revise and distribute telephone directories. The suit was ordered dismissed on the ground the plaintiffs had not exhausted their administrative remedies<sup>49</sup> but the court also noted that, in the light of the holding in the case of *Newberry Library v. Board of Education*<sup>50</sup> and similar cases, each subscriber had a legally separate and distinct claim, which operated to prevent one subscriber from suing in a representative capacity.<sup>51</sup>

Regardless of federal rules and precedents on the subject,<sup>52</sup> the Illinois practice as to representative suits is limited to pro-

<sup>47</sup> 350 Ill. App. 313, 112 N. E. (2d) 733 (1953).

<sup>48</sup> 348 Ill. App. 529, 109 N. E. (2d) 358 (1952). Further appeal has been dismissed.

<sup>49</sup> It was held that the action was one for "reparations" within the meaning of Ill. Rev. Stat. 1953, Vol. 2, Ch. 111½, § 76, rather than one for damages under Section 77, requiring preliminary resort to the Public Utility Commission.

<sup>50</sup> 387 Ill. 85, 55 N. E. (2d) 147 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 82.

<sup>51</sup> Compare the holding therein with that attained in *Johnson v. Halpin*, 413 Ill. 257, 108 N. E. (2d) 429 (1952), where one person who made out-of-state purchases of cigarettes was allowed, in a representative capacity, to test the validity of Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 453.1 et seq., on the ground the result of the action would affect all such purchasers alike.

<sup>52</sup> See Federal Rule 23 as to class suits.

ceedings of equitable character<sup>53</sup> and, typically, is there available only with respect to representative plaintiffs for due process requirements hardly permit of suits against a representative defendant.<sup>54</sup> For these reasons, the court, in the case of *Arthur Rubloff & Co. v. Leaf*,<sup>55</sup> found it proper to strike a complaint at law which sought to recover damages for breach of an agency contract from a single defendant who had been sued as the representative of the holders and owners of the capital stock in a named corporation. Leave was given, however, to file an amended complaint naming all stockholders as parties since the contract relied on appeared to have been made in their behalf.

Perhaps without consciously intending to do so, the Supreme Court, through its decision in the case of *People v. Roth, Inc.*,<sup>56</sup> has provided an excellent illustration of the possibility for joinder of causes and parties, within the framework of one modern civil case, leading to the expeditious disposition of a number of claims at one time.<sup>57</sup> The state there sued several night club and restaurant proprietors, each operating independently, to secure the return of sales tax deposits which had been illegally refunded to them. Although charged as joint tortfeasors, the several defendants were each concerned only as to the particular amounts personally deposited and withdrawn. Being parties to a transaction, or series of transactions, out of which the cause of action arose the several defendants, while not conspirators, were correctly joined in the one suit even though their liability was several in character.<sup>58</sup>

The absence of a clear provision in Illinois authorizing the

<sup>53</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 125, directs that, as to all matters of practice not regulated by statute or rule of court, the practice at common law and in equity shall prevail.

<sup>54</sup> But see Ill. Rev. Stat. 1953, Vol. 1, Ch. 22, § 6, as to suits against persons not in being.

<sup>55</sup> 347 Ill. App. 191, 106 N. E. (2d) 735 (1952).

<sup>56</sup> 412 Ill. 446, 107 N. E. (2d) 692 (1952).

<sup>57</sup> See Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 148(1).

<sup>58</sup> The court held that, there being no showing of conspiracy from the mere fact the several defendants had been represented by one attorney and had co-operated with one another in the refund proceedings, it was proper to enter separate judgments against the several defendants pursuant to Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 174(1).

use of third-party practice<sup>59</sup> does not necessarily require that a civil suit must be confined to those named as parties in the original complaint for Section 25 of the Civil Practice Act authorizes the bringing in of new parties where required for a "complete determination of the controversy,"<sup>60</sup> provided such new parties are concerned in the "controversy" disclosed by the complaint. For that reason, a counterclaim would ordinarily be confined for use as against those already in the litigation<sup>61</sup> and would not, normally, be available to bring in new parties. The case of *Curran v. Harris Trust & Savings Bank*,<sup>62</sup> however, would indicate that, if the counterclaim is in the nature of a cross-bill in equity, it may be utilized to bring in additional parties provided they would have been appropriately added as defendants to a cross-bill under the former equity procedure. In that connection, the court noted that, while Section 25 of the Civil Practice Act superseded former Section 34 of the Chancery Act,<sup>63</sup> the new provision was designed to preserve in full the former chancery practice on the point,<sup>64</sup> so it approved the addition of new parties to the interpleader suit before it. The decision should, however, be carefully analyzed before being applied to other situations, particularly to suits at law, for it cannot be said to give unquestioned approval to unlimited third-party practice.

Little has been said concerning the availability of legal remedies for most issues with respect thereto have long since been decided.<sup>65</sup> In that connection, it might be noted that while the action of trover, as originally conceived at common law, was intended to cover the conversion of specific items of tangible personal

<sup>59</sup> See, in particular, 28 CHICAGO-KENT LAW REVIEW 33.

<sup>60</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 149.

<sup>61</sup> *Ibid.*, Ch. 110, § 162(1), purports to restrict the counterclaim for use by one or more defendants "against one or more plaintiffs, or against one or more co-defendants."

<sup>62</sup> 348 Ill. App. 210, 108 N. E. (2d) 729 (1952), noted in 41 Ill. B. J. 472.

<sup>63</sup> Ill. Rev. Stat. 1931, Ch. 22, § 34.

<sup>64</sup> See Illinois Civil Practice Act Annotated (The Foundation Press, Inc., Chicago, 1933), particularly p. 53.

<sup>65</sup> If there is doubt, and the Civil Practice Act is not specific on the point, it should be remembered that the practice at common law is to prevail: Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 125.

property,<sup>66</sup> modern developments have extended the scope of the remedy to cover situations involving the conversion of instruments for the payment of money.<sup>67</sup> The holding of the case of *People v. Roth, Inc.*,<sup>68</sup> would now indicate that an action analogous to trover might be maintained for the conversion of money placed on deposit with the state treasurer in a protest fund, by an illegal withdrawal thereof, since the state enjoys a special title thereto until the same is legally ordered refunded. The money there concerned, although mingled with other deposits in such fund, was considered sufficiently segregated to be regarded as identifiable property.

By way of contrast to the seemingly settled state of the law concerning legal remedies, some cases of equitable nature call for attention. In *Liberty National Bank v. Metrick*,<sup>69</sup> for example, the owner of a building sought a mandatory injunction to compel the removal, by a taxicab company, of a telephone box which had been fastened to a pole on a sidewalk in front of the building. The owner had contended that rental values would decline because of the congestion caused by the presence of cabs and drivers in front of the building which obstruction would, in turn, impair access to the premises. An order dismissing the complaint for want of equity was upheld on the ground the primary right to the use of city streets and sidewalks was in the public, not in the abutting owners, and any inconvenience the property owner might suffer would be suffered equally by the general public. As the installation had been made with city permission, it was said that any action charging obstruction had to be brought by a proper public official and not by a private citizen.

The presence of laches could operate as a reason for denying equitable relief but, according to the holding in *Ludwig v. Ludwig*,<sup>70</sup>

<sup>66</sup> Trover and detinue were, in many respects, correlative remedies: *Kettle v. Bromsall*, Willes 118, 125 Eng. Rep. 1087 (1738). By virtue of this fact, neither action would lie for a sum of money unless the same was ear-marked in some particular fashion: *Brown v. Ellison*, 55 N. H. 576 (1875).

<sup>67</sup> *Rauch v. Fort Dearborn Nat. Bank*, 223 Ill. 507, 79 N. E. 273, 11 L. R. A. (N. S.) 545 (1906), indicates that an unauthorized dealing with a negotiable instrument would be a conversion.

<sup>68</sup> 412 Ill. 446, 107 N. E. (2d) 692 (1952).

<sup>69</sup> 347 Ill. App. 400, 106 N. E. (2d) 889 (1952).

<sup>70</sup> 413 Ill. 44, 107 N. E. (2d) 848 (1952).

the mere lapse of time would not operate to prevent an inquiry into the fundamental validity of a Nevada divorce decree particularly where the person claiming lack of jurisdiction to grant the divorce had never, in any way, recognized the decree. The case of *Krile v. Swiney*<sup>71</sup> also, in that respect, contains a concise statement with regard to the circumstances under which an action to quiet title will lie.

Injunction practice became the matter of concern in two cases. The first, that of *Fox v. Fox Valley Trotting Club, Inc.*,<sup>72</sup> indicates that allegations verified merely on information and belief will be insufficient to support an order for a temporary injunction. The second, being the case of *Montgomery Ward & Company v. United Retail, Wholesale & Department Store Employees of America, C. I. O.*,<sup>73</sup> dealt with issues concerning the right to claim damages by way of suggestion<sup>74</sup> following reversal of an injunctive order. One such suggestion had been presented, heard, and dismissed but no appeal was taken from the order of dismissal. A second suggestion, seeking an increased amount and containing allegations as to the existence of an injunction bond, was countered with a claim of *res judicata*. A majority of the Appellate Court for the First District agreed that there was no merit in the second suggestion, hence held the same was properly denied, since the mere increase in amount did not make the claim a different one and the reference to the bond added no new features. The court said that if the enjoined party was interested in enforcing liability under the bond a separate legal action for this purpose would have been necessary.

In the course of hearing a proceeding, a chancellor may have occasion to use the services of a master in chancery<sup>75</sup> but chancel-

<sup>71</sup> 413 Ill. 350, 109 N. E. (2d) 189 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 267.

<sup>72</sup> 349 Ill. App. 132, 110 N. E. (2d) 84 (1953). See also *Hope v. Hope*, 350 Ill. App. 190, 112 N. E. (2d) 495 (1953).

<sup>73</sup> 348 Ill. App. 198, 108 N. E. (2d) 784 (1952). Schwartz, J., wrote a concurring opinion. Tuohy, J., wrote a dissenting opinion. Leave to appeal has been denied.

<sup>74</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 69, § 12.

<sup>75</sup> The legislature has authorized an increase in certain fees chargeable by masters in chancery: Laws 1953, p. 1555, H.B. 474; Ill. Rev. Stat. 1953. Vol. 1, Ch. 53,

lors have also been known to appoint special commissioners for this purpose. Prior criticism has been addressed to this practice<sup>76</sup> as well as to the general practice of forcing private litigants to pay fees for the services rendered by masters<sup>77</sup> in cases which ought to be heard by the judges themselves.<sup>78</sup> A further blow appears to have been struck by the decision in the case of *Pokorney v. Pokorney*.<sup>79</sup> The court there pointed out that reference to a special commissioner in divorce cases would be proper only with respect to petitions for the allowance of temporary alimony,<sup>80</sup> never in connection with petitions for modification of alimony orders already entered, and that the practice of making such references forcibly illustrated the evils inherent in compelling litigants to pay the actual cost of procuring justice.<sup>81</sup>

Although a fundamental doctrine proclaims that no action should be maintained in equity where there is an adequate remedy at law, there would seem to be some doubt as to whether the same thing is true with respect to the quasi-equitable statutory proceeding for a declaratory judgment.<sup>82</sup> It has been held that the available presence of a customary remedy would normally preclude use of a proceeding for a declaratory judgment,<sup>83</sup> but the case of *Kitt v. City of Chicago*<sup>84</sup> now indicates that, even though mandamus would lie, recourse to the "speedy and in-

§ 38. It has, however, placed considerable limitation on the fees recoverable for services rendered in cases involving petitions for temporary separate maintenance: Laws 1953, p. 1571, H.B. 991; Ill. Rev. Stat. 1953, Vol. 1, Ch. 68, § 22.

<sup>76</sup> See *Simpson v. Harrison*, 328 Ill. App. 425, 66 N. E. (2d) 494 (1946).

<sup>77</sup> The chancellor may, of course, exercise wide discretion in assessing these costs among the parties: *Jones v. Washington*, 412 Ill. 436, 107 N. E. (2d) 672 (1952).

<sup>78</sup> See Ill. Rev. Stat. 1953, Vol. 2, Ch. 95, § 22b, and note thereon in 26 CHICAGO-KENT LAW REVIEW 40-1.

<sup>79</sup> 348 Ill. App. 364, 109 N. E. (2d) 254 (1952).

<sup>80</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, § 16.

<sup>81</sup> The defendant there, seeking relief from an alimony order on the ground of his inability to pay, stood faced with an obligation to pay over \$400 in commissioner's fees for taking testimony, much of which consisted of an agreed statement of facts, and for the making of a report thereon.

<sup>82</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 181.1.

<sup>83</sup> See, for example, the tax case of *Goodyear Tire & Rubber Co. v. Tierney*, 411 Ill. 421, 104 N. E. (2d) 222 (1952), noted in 40 Ill. B. J. 535. See also Borchard, *Declaratory Judgments*, 2d Ed., pp. 320 and 342.

<sup>84</sup> 415 Ill. 246, 112 N. E. (2d) 607 (1953).

expensive'' method of determining disputes by declaratory judgment is permissible where there is an actual controversy or where it is necessary to secure a construction of a statute or municipal ordinance.<sup>85</sup> One using a declaratory judgment proceeding should, like any other litigant, be obliged to state a case and, when required, be able to prove it if he is to have the benefit of the statute. The Supreme Court decision in the case of *Powell v. Trustees of Schools*<sup>86</sup> is, in that respect, noteworthy for the court there required a party, seeking a declaration that he held title to a parcel of real estate, to establish his claim on the strength of his own title, as would have been required if he had sued in ejectment, thereby denying him the right to rest his case on the weakness of the title of his adversary.

#### PREPARATION OF PLEADINGS

If the Civil Practice Act did nothing else, it certainly made it possible for a pleader, in doubt as to which of two or more defendants was the one liable to the plaintiff, to set up his case in alternative form, in one count or in separate counts,<sup>87</sup> to the end that the one actually responsible could be compelled to respond for his fault. Despite this, the plaintiff in *Lustig v. Hutchinson*,<sup>88</sup> with the approval of at least a majority of the judges of the Appellate Court for the First District, seems to have found a novel way to approach the problem by stating his case as to one defendant and then adding the names of others who might, in the alternative, be liable but without the addition of any charge as to them. It must be acknowledged that the court was helped toward reaching its approval of this method of pleading by the failure of the defendants so joined to question the sufficiency of the complaint<sup>89</sup> until after trial, but even so, it is doubtful if any doctrine

<sup>85</sup> The case would also appear to be authority for the point that, by suitable amendment, existing litigation seeking coercive relief may be converted into a proceeding for no more than a declaration of rights. See Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 170.

<sup>86</sup> 415 Ill. 236, 112 N. E. (2d) 478 (1953).

<sup>87</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 148.

<sup>88</sup> 349 Ill. App. 120, 110 N. E. (2d) 278 (1953), noted in 31 CHICAGO-KENT LAW REVIEW 275. Kiley, J., wrote a dissenting opinion.

<sup>89</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 169, authorizes objection to pleadings by motion.



of aider by verdict could go to the length of supplying an entire statement of a case, much as it might be used to help out a defectively stated one.

Insofar as defensive pleadings are concerned, the provisions of Section 43 of the Civil Practice Act<sup>90</sup> would appear to treat the defense of release as being truly affirmative in character, with the burden of proof being assigned in accordance with the principle that he who must plead should also prove. If, however, according to the case of *Williams v. East St. Louis Junction Railroad Company*,<sup>91</sup> the plaintiff admits the making of the release but seeks to avoid the effect thereof because of fraud or mistake, the burden is then on him to establish at least a prima facie case in this respect before being entitled to have the jury pass on the point.<sup>92</sup> This being true, the court found little difficulty there in avoiding the effect of the United States Supreme Court decision in *Dice v. Akron, Canton & Youngstown Railroad Company*,<sup>93</sup> a case which required submission of the question of the existence of a release to the jury, in federal employer's liability situations, in conformity with federal rather than state doctrines on the point, because the plaintiff had failed to offer prima facie proof. In the absence thereof, it was held proper for the court to take that issue from the jury by means of a directed verdict or judgment notwithstanding the verdict.

Although repeal by implication is not favored, the case of *Schmidt v. Reader's Digest Association, Inc.*,<sup>94</sup> would tend to indicate that the statutory requirement as to verification of certain pleas in abatement<sup>95</sup> is inapplicable with respect to the modern substitute in the form of a motion to dismiss.<sup>96</sup> Accept-

<sup>90</sup> Ibid., Ch. 110, § 167(4).

<sup>91</sup> 349 Ill. App. 296, 110 N. E. (2d) 700 (1953). Leave to appeal has been denied.

<sup>92</sup> See *Callen v. Pennsylvania Ry. Co.*, 332 U. S. 625, 68 S. Ct. 296, 92 L. Ed. 242 (1948).

<sup>93</sup> 342 U. S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 364.

<sup>94</sup> 349 Ill. App. 252, 110 N. E. (2d) 538 (1953).

<sup>95</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 1, § 1, states: "That no plea in abatement, other than a plea to the jurisdiction of the court . . . shall be admitted, unless the same is verified by the affidavit of the person offering the same, or of some other person for him."

<sup>96</sup> Ibid., Ch. 110, § 172.

ing, for the purpose, that verification is still necessary, the court nevertheless found the affidavit before it sufficient on the ground the out-of-state notary public, who lacked a seal of office, had sufficiently demonstrated his authority to administer an oath by attaching a certificate of magistracy.<sup>97</sup> In that same case, the Appellate Court expressed belief that a trial court could, by overruling a motion to strike a motion to strike,<sup>98</sup> leave the issue created by the first of these motions unsettled so as to permit the opposing party to take issue with the facts therein relied upon. It would seem, at least with respect to motions made pursuant to Section 48 of the Civil Practice Act,<sup>99</sup> that, if the opposing party believes the motion to be inadequate as to form or substance, he should call the same up for disposition on the then state of the record rather than to engage in a form of practice equivalent to demurring to a demurrer.<sup>1</sup> If the court should conclude that the motion to dismiss was in proper form, it would still have the right to deny the same without prejudice, especially if it was made to appear that there was likely to be a dispute as to the facts. The objection could then, both logically and correctly, be made by an answer in abatement and a reply thereto,<sup>2</sup> without encumbering the record with a confusing series of motions.

Most of the pleading questions turned on the right to make necessary amendments to pleadings.<sup>3</sup> What started out to be a movement for a very illiberal attitude on the point received a set-back when the Supreme Court granted leave to appeal in the case of *Vukovich v. Custer*.<sup>4</sup> A complaint for personal injuries

<sup>97</sup> Ibid., Ch. 101, § 6, was said to possess no more than prima facie effect, and that proof in the manner provided by Ch. 99, § 6, dealing with domestic notaries, would be an acceptable substitute.

<sup>98</sup> The first of the motions therein was actually a motion to dismiss for lack of jurisdiction over the person of the defendant, filed pursuant to Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 172(1) (a), supported with an affidavit as to facts existing outside of the record, thereby partaking of the nature of a "speaking" demurrer.

<sup>99</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 172.

<sup>1</sup> Campbell v. St. John, 1 Salk. 219, 91 Eng. Rep. 194 (1689).

<sup>2</sup> See Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 167(3) and § 156.

<sup>3</sup> The case of *Williams v. Fredenhagen*, 350 Ill. App. 26, 111 N. E. (2d) 578 (1953), might be here mentioned for it extends the application of the amendment provisions of the Civil Practice Act to scire facias proceedings brought to revive a judgment under Ill. Rev. Stat. 1953, Vol. 2, Ch. 83, § 24b.

<sup>4</sup> 415 Ill. 290, 112 N. E. (2d) 712 (1953), reversing 347 Ill. App. 547, 107 N. E. (2d) 426 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 184.

had there been filed in the name of the injured person on the day he died as a consequence of the injuries complained about. Just short of one year after institution of the suit, the legal representative of the deceased plaintiff secured permission to be substituted as a party and then offered an amended complaint,<sup>5</sup> designed to change the action to one for wrongful death. The amended complaint was afterwards stricken on motion. The Supreme Court, reversing both the trial court and the Appellate Court, held the amendment proper, although it seems to have treated the substituted complaint as being more nearly an original rather than an amended one, at the same time that it refused to resolve the dispute as to the effect to be given to the death of a nominal plaintiff prior to the institution of the suit.<sup>6</sup> One is left to speculate on the validity of a summons, forming the basis of jurisdiction, which specifies the name of the non-existent party.

The course of action taken in the case of *Rasgaitis v. Rasgaitis*<sup>7</sup> would indicate that, despite emphasis on the abolition of distinctions in the manner of pleading between actions at law and suits in equity,<sup>8</sup> procedural methods utilized in the two types of cases do still differ. In a suit at law, for example, it would have been highly objectionable for the plaintiff to have anticipated a defense<sup>9</sup> since the proper procedural method required the plaintiff to await the raising thereof by the defendant's plea and thereafter, through a replication, nullify the effect thereof. In direct contrast, the former equity complainant who had failed to notice a potential defense was obliged, through an amended bill of complaint, to give recognition thereto at the time he pleaded the new matter designed to avoid that defense.<sup>10</sup> The modern procedure would seem to suggest that the plaintiff should not anticipate, especially in the case of the truly affirmative defenses,<sup>11</sup>

<sup>5</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 170, deals with the amendment of pleadings.

<sup>6</sup> The opinion intimates that the holding in *Pease v. Rockford City Traction Co.*, 279 Ill. 513, 117 N. E. 83 (1917), may have been nullified by the present statutory provision concerning amendment of pleadings.

<sup>7</sup> 347 Ill. App. 477, 107 N. E. (2d) 273 (1952).

<sup>8</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 155(1).

<sup>9</sup> *Conte v. Allen Candy Co.*, 230 Ill. App. 471 (1923).

<sup>10</sup> *Cushman v. Bonfield*, 139 Ill. 219 at 247, 28 N. E. 937 at 946 (1891).

<sup>11</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 167(4).

but should wait until the same are raised and then combat by the use of a reply.<sup>12</sup> Despite this, in the case mentioned, the court appears to have approved the action of the plaintiff in there filing an amended divorce complaint setting forth supplemental acts of cruelty to offset the affirmative defense of condonation based on continued cohabitation.<sup>13</sup> If there is any justification for practice of that nature, it can only be found in Rule 10 of the Illinois Supreme Court with its doubtful reference to the fact that, as to all matters cognizable by courts of equity, the same "shall be heard and decided in the manner heretofore practiced in courts of equity."<sup>14</sup>

The desire that civil litigation should achieve a speedy and final determination "according to the substantive rights of the parties"<sup>15</sup> is further reflected in the provision that defects in pleadings, either as to form or substance, not objected to in the trial court "shall be deemed waived."<sup>16</sup> The last mentioned statement has been considered to be a statutory reference to something at least akin to the common law doctrine of *aider by verdict*.<sup>17</sup> Pursuant thereto, pleadings which might be lacking in that degree of particularity or clarity necessary to withstand a motion to strike may, if no objection is made until after trial, be considered sufficient on appeal.<sup>18</sup> The case of *Gustafson v. Consumers Sales Agency*<sup>19</sup> serves to throw additional light on the subject for the complaint therein, based on an alleged wrongful death, made no direct charge that the decedent left next of kin<sup>20</sup> and would

<sup>12</sup> *Ibid.*, Ch. 110, § 156, directs that "when new matter by way of defense . . . is pleaded in the answer, the reply *shall* be filed by the plaintiff." Italics added.

<sup>13</sup> See *Lipe v. Lipe*, 327 Ill. 39, 158 N. E. 411 (1927).

<sup>14</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 259.10.

<sup>15</sup> *Ibid.*, Ch. 110, § 128.

<sup>16</sup> *Ibid.*, Ch. 110, § 166(3).

<sup>17</sup> *Connett v. Winget*, 374 Ill. 531, 30 N. E. (2d) 1 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 189.

<sup>18</sup> *Owen-Illinois Glass Co. v. McKibbin*, 385 Ill. 245, 52 N. E. (2d) 177 (1944).

<sup>19</sup> 414 Ill. 235, 110 N. E. (2d) 865 (1953), reversing 346 Ill. App. 493, 105 N. E. (2d) 557 (1952).

<sup>20</sup> The Injuries Act, Ill. Rev. Stat. 1953, Vol. 1, Ch. 70, § 2, specifies that the amount recovered shall be for the exclusive benefit of the widow and next of kin. Where none survive, the maximum possible recovery is sharply curtailed in favor of other designated persons.

have been vulnerable to a motion to strike for that reason<sup>21</sup> but, no objection having been made in the trial court,<sup>22</sup> a judgment for plaintiff was nevertheless sustained because some vague references in the complaint to "plaintiff's intestate" together with a degree of similarity in the names of the parties, plus some proof on the point, was enough, under the doctrine of *aider by verdict*, to cure the defect without the necessity of an amendment.

#### THE TRIAL OF THE CASE

Antecedent to the trial itself, some questions may be generated regarding such things as judgment by confession,<sup>23</sup> summary judgment, pre-trial procedure and the like. While summary judgment procedure in the federal courts may be used without limitation,<sup>24</sup> the practice in state courts is to confine the use thereof to a case in which no genuine controverted issue of fact exists and provided the case also falls into one or more of four specified categories.<sup>25</sup> It was argued, in the case of *Rowan v. Matansky*,<sup>26</sup> that a claim for treble damages under Section 205 of the Housing and Rent Act<sup>27</sup> fell within the class of contracts "implied in law," so as to justify the use of summary judgment procedure, but the court, treating the case as one to recover a statutory penalty, hence more nearly in the nature of a suit in debt,<sup>28</sup> ruled that it was improper to grant summary judgment therein.

Although the legislative provisions with respect to the giving

<sup>21</sup> *North Pier Terminal Co. v. Hoskins Coal & Dock Corp.*, 402 Ill. 192, 83 N. E. (2d) 748 (1949).

<sup>22</sup> A motion for judgment notwithstanding the verdict had been presented, but it was not specific on the point. See Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 192(1).

<sup>23</sup> The case of *Skolnik v. Susco Production Corp.*, 349 Ill. App. 402, 111 N. E. (2d) 180 (1953), would indicate that a variance between the contractual language used in a note authorizing judgment by confession and the *cognovit* on which the confessed judgment was based would be insufficient to warrant reversal of the judgment in the absence of a showing of prejudice. See, however, the case of *Woelter v. Labowitch & Morris Discount Service*, 348 Ill. App. 168, 108 N. E. (2d) 519 (1952), regarding the confession of judgment against a partnership.

<sup>24</sup> See Federal Rule 56.

<sup>25</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 181.

<sup>26</sup> 348 Ill. App. 296, 108 N. E. (2d) 799 (1952).

<sup>27</sup> 50 U. S. C. A. § 1895.

<sup>28</sup> But note the holding in *Waxman v. Williamson*, 256 N. Y. 117, 175 N. E. 534 (1931).

of notice prior to the entry of a default judgment were declared unconstitutional in the case of *Agran v. Checker Taxi Company*,<sup>29</sup> the uncriticized portions of the Civil Practice Act dealing with default procedure<sup>30</sup> still contain a limitation in that a true default judgment, as there authorized, is to be entered only when there is a total want of appearance. If, following appearance, there is a failure to answer or plead in the manner and within the time required by Rule 8 of the Supreme Court,<sup>31</sup> steps to default a neglectful party should be taken only after notice. In that connection, the case of *Admiral Corporation v. Newell*<sup>32</sup> is important for the court there, when construing Rule 7, which deals with the sufficiency of notice and the manner of service thereof,<sup>33</sup> came up with the conclusion that a default judgment would have to be set aside in case there was a non-compliance therewith inasmuch as substantial compliance with the terms of the rule was deemed to be essential.

One about to take a default judgment should be aware of the fact that, while there is authority for the rendition of more than one judgment in the cause,<sup>34</sup> as well as further provision to the effect that a judgment against one of several joint debtors shall not bar a remedy against the others,<sup>35</sup> the statute is silent as to the effect to be given to a judgment pronounced against one of several joint tort feorsors provided nothing is said therein as to the liability of the others. The case of *Martinez v. Seymour*,<sup>36</sup> reaffirming earlier practice on the point,<sup>37</sup> now indicates that the taking of a final judgment as to one joint tort feor operates as

<sup>29</sup> 412 Ill. 145, 105 N. E. (2d) 713 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 383.

<sup>30</sup> See Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 174(6).

<sup>31</sup> *Ibid.*, Ch. 110, § 259.8.

<sup>32</sup> 348 Ill. App. 180, 108 N. E. (2d) 521 (1952). Leave to appeal has been denied.

<sup>33</sup> The record indicated that the attorney who filed the appearance failed to comply with Rule 6(5) by omitting therefrom information concerning his business address. Notice of application for default was likewise defective because, while served by mail, it failed to disclose the "complete address" appearing on the envelope in which such notice was mailed.

<sup>34</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 174(1).

<sup>35</sup> *Ibid.*, Ch. 110, § 151.

<sup>36</sup> 348 Ill. App. 112, 108 N. E. (2d) 30 (1952).

<sup>37</sup> See *Postal Telegraph-Cable Co. v. Likes*, 225 Ill. 249, 80 N. E. 136 (1907), followed in *Pierson v. Lyon & Healy*, 243 Ill. 370, 90 N. E. 693 (1910).

an implied dismissal as to the others. There would, then, appear to be reason to refrain from taking judgment as to a defaulting tortfeasor until all issues have been resolved, for Rule 16 of the Supreme Court<sup>38</sup> is apparently intended to keep the litigation alive only when the summary judgment does not dispose of all of the issues in the case.

Matters relating to pretrial discovery were concerned in two cases. In one of them, that of *Elliott v. Brown*,<sup>39</sup> it was held that an unwillingness on the part of a defendant to exhibit documents in his possession relating to the case, although concurred in by the trial court which had sustained an objection to a motion to compel production,<sup>40</sup> was adequate reason for excluding such documents when they were later offered at the trial.<sup>41</sup> In the other, that of *Pink v. Dempsey*,<sup>42</sup> it was said that the taking of a pretrial deposition<sup>43</sup> from a claimant against a decedent's estate, but which deposition was not offered at the trial, did not operate to waive the provisions of the "dead man's" act<sup>44</sup> or make the claimant competent to testify in her own behalf.<sup>45</sup> The opinion therein deserves careful reading for it appears to have explored the question thoroughly.<sup>46</sup>

A question concerning the admissibility of evidence of a compromise agreement made between a defendant and a third person injured in the same accident arose in the case of *Feinberg v. Rosenthal*.<sup>47</sup> The third party had become a witness by deposition,

<sup>38</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 259.16.

<sup>39</sup> 349 Ill. App. 428, 111 N. E. (2d) 169 (1953).

<sup>40</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 259.17(4).

<sup>41</sup> *Ibid.*, Ch. 110, § 259.17(6).

<sup>42</sup> 350 Ill. App. 405, 113 N. E. (2d) 334 (1953). Leave to appeal has been denied.

<sup>43</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 182.

<sup>44</sup> *Ibid.*, Vol. 1, Ch. 51, § 2.

<sup>45</sup> The earlier case of *Chapman v. Bruton, Inc.*, 325 Ill. App. 334, 60 N. E. (2d) 125 (1945), had reached the same conclusion, but the decision therein turned on an examination made pursuant to Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 184.

<sup>46</sup> An informative statement as to the scope and purposes of pre-trial procedure in federal district courts is provided, at 14 F. R. D. 417 (1953), by Judge Alfred P. Murrah, Chairman of the Pre-Trial Committee of the Judicial Conference of the United States. While confined to a discussion of the federal rules on the subject, the article might serve to shed light on parallel areas in Illinois practice.

<sup>47</sup> 348 Ill. App. 510, 109 N. E. (2d) 402 (1952), noted in 16 U. of Detroit L. J. 201. Leave to appeal has been denied.

in which deposition the compromise payment stood disclosed, and the objection rested on the well-known theory that evidence as to a settlement should be excluded in order to facilitate compromise of claims outside of court. The plaintiff, on the other hand, wanted the evidence admitted as it would tend to show bias on the part of the third person. No unusual circumstances having been shown to take the case out of the general rule, nor any fraud or questionable practice indulged in to procure or influence the testimony, the action of the trial court in excluding that portion of the deposition relating to the compromise was sustained.

Much more startling was the evidence ruling contained in the criminal case of *People v. Lettrich*.<sup>48</sup> The defendant there had been convicted of murder and sentenced to death on evidence consisting principally of his own confession. He urged, on appeal, that error had been committed by the trial judge in refusing to admit hearsay evidence that another person, not then before the court, had confessed to the crime. There is no question but that the general rule is that extra-judicial statements by a third person to the effect that he committed the crime in question, while patently against his interest, are inadmissible and the case of *Donnelly v. United States*<sup>49</sup> has been the outstanding authority on the point for many years. The Supreme Court, acting to reverse the conviction because of other errors in the record, said that, under the special circumstances of the case, a departure from the rule would be proper, particularly where the state was relying upon the repudiated confession of the defendant. To quote from the opinion of Justice Maxwell, it would seem that "justice requires that the jury consider every circumstance which reflects upon the reliability" of a confession, and a confession by a third party "is such a circumstance."<sup>50</sup> No Illinois case was cited, however, so the instant holding appears to be the first to intimate that the rule of the *Donnelly* case is not all-inclusive.

<sup>48</sup> 413 Ill. 172, 108 N. E. (2d) 488 (1952), noted in 6 Vanderbilt L. Rev. 924.

<sup>49</sup> 228 U. S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913).

<sup>50</sup> 413 Ill. 172 at 179, 108 N. E. (2d) 488 at 492.



Problems concerning impeachment of witnesses were also considered. In the case of *People v. Van Dyke*,<sup>51</sup> the prosecution sought to impeach one of its own witnesses, who had refused to answer questions pertaining to the crime under investigation for constitutional reasons, by asking, on cross-examination, whether the witness had not made certain inconsistent statements to the assistant state's attorney. This line of investigation was held not to be error on the theory that, as allowed in previous cases, it might "refresh the memory of the witness or awaken his conscience," hence was permissible not for the purpose of demonstrating unworthiness or incredibility on the part of the witness but merely to show the prior inconsistent statements. But query, just where is the line between the two? On the other hand, in *People v. Kirkpatrick*,<sup>52</sup> it was held improper to seek to impeach the defendant's testimony by producing a record of his prior conviction for violation of the federal Dyer Act, an infamous crime under the federal law, because the earlier conviction was not regarded as being infamous within the meaning of the applicable provision of the state criminal code.<sup>53</sup>

Statutory modification of evidence law has been brought about by amendment which extends the privilege of taking depositions from witnesses within, as well as those without, the state,<sup>54</sup> but subject to the limitations heretofore expressed. Another amendment makes it clear that any discovery obtained at the trial as the result of conducting an examination of an adverse party is to be regarded as part of the record in the case.<sup>55</sup> By virtue of a new provision, no witness may be compelled to testify, whether before a court, a commission, an administrative agency, or other tribunal, if any portion of the testimony is to be broadcast or televised, or if motion pictures are to be taken of him while so

<sup>51</sup> 414 Ill. 251, 111 N. E. (2d) 165 (1953), cert. den. 345 U. S. 978, 73 S. Ct. 1127, 97 L. Ed. (adv.) 958 (1953), noted in 1953 Ill. L. Forum 296.

<sup>52</sup> 413 Ill. 595, 110 N. E. (2d) 519 (1953), noted in 31 CHICAGO-KENT LAW REVIEW 380.

<sup>53</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 587.

<sup>54</sup> Laws 1953, p. 1555, H.B. 572; Ill. Rev. Stat. 1953, Vol. 1, Ch. 51, § 25.

<sup>55</sup> Laws 1953, p. 857, S.B. 306; Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 184.

testifying.<sup>56</sup> While possessing its source in the Criminal Code, a change in the procedure for testing the competency of an alleged confession, before the same is offered in a criminal case, has bearing on the law of evidence. Under the new provision,<sup>57</sup> the defendant may, on preliminary motion, have the question tested, with the result that if the court finds the confession incompetent it shall be suppressed and may not be offered or received at the trial. A failure to make such a motion, or an adverse ruling thereon, is not to prejudice the defendant's right to show incompetency, if he can do so, at the trial of the case.

#### DAMAGES

Mention has been made elsewhere concerning the rule to be followed in awarding damages in tort cases where the injured person has proceeded against the careless servant and also against the master on the theory of *respondeat superior*.<sup>58</sup> The tort case of *Hall v. Chicago & North Western Railway Company*<sup>59</sup> is also worthy of brief note for the defendant's counsel there sought to comment on the fact that the amount which might be assessed as damages would not be subject to deduction for federal income taxes<sup>60</sup> but was restrained from so doing by the trial court. The Appellate Court for the First District, with an eye on the fact that juries probably speculate on whether or not their awards will be subject to taxation and, from misconception as to the law on the point, frequently produce larger verdicts than would otherwise result, held the defense comment was proper under the circumstances. It could find only one decision, a recent Missouri case,<sup>61</sup> which had, prior to this, dealt with the same point, but it considered the defendant's comment proper to offset the plaintiff's common practice of urging the jury, when assessing dam-

<sup>56</sup> Laws 1953, p. 1165, H.B. 344; Ill. Rev. Stat. 1953, Vol. 1, Ch. 51, § 57.

<sup>57</sup> Laws 1953, p. 1166, S.B. 622; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 736.1.

<sup>58</sup> See above, under the topic of Principal and Agent, particularly note 25, for a discussion of the case of *Aldridge v. Fox*, 348 Ill. App. 96, 108 N. E. (2d) 139 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 277.

<sup>59</sup> 349 Ill. App. 175, 110 N. E. (2d) 654 (1953). Appeal therein has been dismissed.

<sup>60</sup> 26 U. S. C. A. § 22(b) (5).

<sup>61</sup> See *Dempsey v. Thompson*, — Mo. —, 251 S. W. (2d) 42 (1952).

ages, to consider the depreciation which has taken place in the value of the dollar.

In the only other damage case of significance, that of *Randall v. General Motors Corporation*,<sup>62</sup> the plaintiff, when suing for breach of a covenant contained in a lease, was faced with a rider covering a security deposit which provided that, in case of default, the deposit should become additional rent as liquidated damages without prejudice to the lessor's other rights "except additional monetary damages." The plaintiff saw fit to urge the provision was essentially one for a penalty, probably because he thought he could prove a greater amount of damage than the sum fixed by the rider, but the Appellate Court held him to the terms thereof, particularly since the security deposit had never been applied toward the satisfaction of the rent due under the lease. To reach such result in the absence of any Illinois precedent, the court relied on an Oklahoma decision.<sup>63</sup>

#### APPEAL AND APPELLATE PROCEDURE

The time for taking an appeal with respect to certain interlocutory orders, such as the granting of an injunction or the appointment of a receiver, is fixed not only by statute but also by rule of court,<sup>64</sup> with an alternative provision to the effect that, if a motion to vacate such an order is not decided within seven days after presentation, the appeal may then be taken without the need for further delay. The case of *City of Edwardsville v. Illinois Terminal Railroad Company*<sup>65</sup> offers the further thought that, if the litigant is willing to allow the trial court additional time in which to rule on a motion to vacate, he should not be barred from appeal, even though the time normally allotted may have expired, but is to be entitled to have the full time period for appeal following the disposition of the motion. The suggestion is a commendable one for the litigant, by suffering the delay

<sup>62</sup> 350 Ill. App. 384, 112 N. E. (2d) 915 (1953).

<sup>63</sup> *Southern Motor Supply Co. v. Shelbourne Motor Co.*, 172 Okla. 495, 46 P. (2d) 562 (1935).

<sup>64</sup> See Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 202 and § 259.31.

<sup>65</sup> 350 Ill. App. 63, 111 N. E. (2d) 707 (1953).

without exposing himself to loss of the right to secure review, may find that no appeal is necessary. Provided an appeal has been perfected in accordance with Section 76 of the Civil Practice Act and within the time there mentioned,<sup>66</sup> the holding in the case of *Rowan v. Matanky*<sup>67</sup> would indicate that a two-day delay in serving notice of appeal, if done within the ten-day period after the filing thereof, but beyond the ninety-day period from date of judgment as specified in Rule 34 of the Supreme Court,<sup>68</sup> will not serve to nullify the appeal, at least in the absence of a showing of prejudice to the appellee.

If an appeal is taken as a matter of right within ninety days from the entry of the order complained of,<sup>69</sup> the time in which other necessary steps, such as preparing a report of the proceedings, must be taken may be enlarged from time to time, provided each new extension is secured before the expiration of the period preceding it.<sup>70</sup> If not, the appellant may have to seek permission to file his appeal under the so-called "long appeal" provisions with the burden of showing the absence of culpable negligence on his part.<sup>71</sup> The case of *McLean v. Board of Education*<sup>72</sup> would, in that connection, indicate that the carelessness of a court reporter in mislaying her stenographic notes ought not be chargeable to the appellant for that fact would not evidence culpable negligence on the appellant's part.

Once the appeal has been providently taken, provided it is taken to the appropriate reviewing court,<sup>73</sup> the appellant may

<sup>66</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 200.

<sup>67</sup> 348 Ill. App. 296, 108 N. E. (2d) 799 (1952).

<sup>68</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 259.34(1)(a), directs that, when an appeal is taken as of right, the notice shall be served "within ninety days from the entry of the order . . . from which the appeal is taken."

<sup>69</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 200.

<sup>70</sup> *Ibid.*, Ch. 110, § 259.36.

<sup>71</sup> *Ibid.*, Ch. 110, § 200.

<sup>72</sup> 350 Ill. App. 209, 112 N. E. (2d) 630 (1953).

<sup>73</sup> Following in line with the holding in *People v. Home Real Estate Improvement Corp.*, 379 Ill. 536, 42 N. E. (2d) 80 (1942), wherein it was held that an interested school district had no right to direct appeal to the Supreme Court from a sale on tax foreclosure where no issue of revenue was directly involved, is the more recent case of *People v. Smith*, 413 Ill. 382, 109 N. E. (2d) 196 (1952). The dispute there concerned rival claims, by private parties, to be declared the successful bidder at a

be faced with the problem of what to do in case some change in law occurs while his appeal is pending. The case of *Quitman v. Chicago Transit Authority*<sup>74</sup> is, for that reason, important inasmuch as, while the appeal therein was pending before the Appellate Court, the statute relied on was, at the instance of other parties, declared unconstitutional by the Supreme Court.<sup>75</sup> This fact was brought to the attention of the reviewing tribunal by means by supplemental briefs, whereupon the appellee urged that, as no constitutional issue had been raised in the case at hand, or if raised had been waived by taking an appeal to the Appellate Court,<sup>76</sup> the appeal should be decided without taking the decision as to the constitutionality of the statute into consideration. The reviewing court, however, refused to close its eyes on the point for it considered the statute as void *ab initio*, hence in no way controlling in the case before it.

In the event it is possible to secure further review on leave to appeal, it might be noted that the statute authorizing the Supreme Court to act in no way restricts the appellate jurisdiction of that court to those matters urged in the petition on which such leave is granted.<sup>77</sup> It would, however, be normal to expect that the reasons assigned, reasons which probably motivated the court to grant leave to appeal, would be the ones assigned and passed upon on further review. The opinion in the case of *Glasser v. Essaness Theatres Corporation*<sup>78</sup> is surprising, therefore, in that the court, after noting that appellant's petition for leave to appeal had contained much on the point of an alleged

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tax foreclosure sale. The appeal was ordered transferred on the ground the case was not one in which the state was "interested," either as a party or otherwise, nor did it directly involve issues relating to state revenue. Following transfer, the decree was affirmed in 350 Ill. App. 127, 111 N. E. (2d) 841 (1953).

<sup>74</sup> 348 Ill. App. 481, 109 N. E. (2d) 373 (1952). See also *Hannigan v. Chicago Motor Coach Co.*, 348 Ill. App. 473, 109 N. E. (2d) 381 (1952).

<sup>75</sup> The issue was one concerning the application of the first paragraph of Section 29 of the Workmen's Compensation Act, Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 166, to a suit brought by a covered employee against a third-party tortfeasor. The statute was declared unconstitutional in the case of *Grasse v. Dealers Transport Co.*, 412 Ill. 179, 106 N. E. (2d) 124 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 375.

<sup>76</sup> See *Armour & Co. v. Industrial Board*, 275 Ill. 328, 114 N. E. 173 (1916).

<sup>77</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 199(2).

<sup>78</sup> 414 Ill. 180, 111 N. E. (2d) 124 (1953).

impropriety on the part of an appellate court in granting a rehearing,<sup>79</sup> but which point had thereafter apparently been abandoned if the total silence with respect thereto in appellant's brief offered any guide whatever, then proceeded to decide other issues raised by the brief. The practice of seeking leave to appeal on the basis of controversial points in need of clarification, and then abandoning these points when leave has been obtained, is scarcely one to be commended. It would also seem to be one which ought not be countenanced by the Supreme Court in the interest of protecting itself from imposition.

#### ENFORCEMENT OF JUDGMENTS

When, in contradiction to the common-law practice, the legislature opened the door to the rendition of more than one judgment in a civil action, it generated a degree of confusion which has not yet been allayed. The case of *Zboinsky v. Wjocik*<sup>80</sup> does indicate, however, that, after a judgment has been rendered against one of several joint tort feasons named as co-defendants in the one suit, but with a reservation of jurisdiction as to the others, subsequent events which might affect the liability of the remaining defendants will not operate to change the liability of the judgment defendant. In that case, a release given to one of the non-judgment defendants, which would ordinarily have operated to discharge all,<sup>81</sup> was held not to affect the judgment debtor nor entitle him to a satisfaction of the judgment pronounced against him on the ground that, by virtue of the judgment, his liability was thereafter separate and distinct from that of his fellow wrong-doers. It was, therefore, deemed proper to confine the judgment debtor pursuant to a *capias ad satisfaciendum*.<sup>82</sup>

Another dram shop case, that of *Hyland v. Waite*,<sup>83</sup> is particularly noteworthy for a question arose therein whether a bona

<sup>79</sup> This point is covered in a note in 31 CHICAGO-KENT LAW REVIEW 187, discussing the holding of the Appellate Court in 346 Ill. App. 72, 104 N. E. (2d) 510 (1952).

<sup>80</sup> 347 Ill. App. 226, 106 N. E. (2d) 764 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 384.

<sup>81</sup> *Welty v. Laurent*, 285 Ill. App. 13, 1 N. E. (2d) 577 (1936).

<sup>82</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 77, § 5.

<sup>83</sup> 349 Ill. App. 213, 110 N. E. (2d) 457 (1953). Leave to appeal has been denied.

fide purchaser of land, occupied and used for tavern purposes, would take the property subject to the lien of a judgment not pronounced until after the sale to such purchaser in proceedings not even then begun but based upon a then existing cause of action for violation of the Dram Shop Act.<sup>84</sup> The plaintiff there contended that the lien of his judgment, enforceable under the statute against the premises in which the violation occurred,<sup>85</sup> should be held to possess retroactive effect back to the date when the cause of action arose, regardless of the absence of notice. If this contention were true in law, a cloud would be cast on the title to every parcel of land now in use, or which had been used, for tavern purposes. The Appellate Court for the First District, however, came to the conclusion that, without regard to what the rule might be where some notice could be said to exist in the form of a pending suit, the circumstances in the case before it required a holding that the bona fide purchaser should be protected in his purchase.<sup>86</sup>

The garnishment case of *Kores Carbon Paper & Ribbon Manufacturing Company v. Western Office Supply Co., Inc.*,<sup>87</sup> while not essentially new in law, is interesting in its factual aspects. The judgment creditor there sought to garnishee a bank account of a corporate judgment debtor on the theory the bank in question had permitted improper withdrawals from the funds on deposit, which money, if replaced, would then be available to satisfy the judgment. At the time of the deposit, the bank had been directed to pay out only on corporate checks bearing two specified signatures. It did, nevertheless, pay out the deposit, almost to the point of exhaustion, on checks signed by only one person. On the basis that the corporate depositor, by silent acquiescence, had ratified the bank's conduct in honoring the irregular checks, hence could not complain, the court reached the result that the liability of the garnishee to the judgment debtor would

<sup>84</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 43, § 135.

<sup>85</sup> Ibid., Ch. 43, § 136.

<sup>86</sup> The court could cite only the early Ohio case of *Bellinger v. Griffith*, 23 Ohio St. 619 (1873), as having any bearing on the point.

<sup>87</sup> 349 Ill. App. 208, 110 N. E. (2d) 461 (1953).

be no greater than the balance remaining on deposit in the account.<sup>88</sup>

#### IV. CRIMINAL LAW AND PROCEDURE

Interpretation and clarification of portions of the Criminal Code and of criminal provisions to be found elsewhere among the statutes has been accomplished by means of a number of new decisions and by legislative action although basic rules have remained largely unchanged. Looking first to cases, it is to be noted that the state, as well as the ordinary individual, is a party to be protected according to the decision in *People v. Gibbs*,<sup>1</sup> one construing the confidence game statute.<sup>2</sup> It was there decided that the word "person," as used in the statute to describe the party imposed upon, includes the body politic. Although no prior decision existed on the point, a part of the act dealing with construction of statutes<sup>3</sup> was cited as direct support for this holding.

One case of note, involving the crime of conspiracy, that of *People v. Dorman*,<sup>4</sup> presented a new question. The pertinent statute, prohibiting conspiracy to do certain designated acts, concludes with the words "or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice."<sup>5</sup> The second count of the indictment in question charged a conspiracy to do an illegal act injurious to the public morals, to-wit: keeping book. A motion to quash this count having been sustained, the state brought writ of error, thereby directly placing in issue the question as to whether or not the offense of keeping book was an "illegal act" within the meaning of the conspiracy statute. The Appellate Court for the Third District, applying the doctrine

<sup>88</sup> It might be noted that some revision has been made in the Garnishment Act. The penalty for illegally serving a wage demand before judgment has been entered has been enlarged, and an increase has occurred in the amount of exempted wages, to mention but two points. See Laws 1953, p. 220, S.B. 113, Ill. Rev. Stat. 1953, Vol. 1, Ch. 62, § 1 et seq.

<sup>1</sup> 413 Ill. 154, 108 N. E. (2d) 446 (1952).

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 257.

<sup>3</sup> Ibid., Vol. 2, Ch. 131, § 1.05.

<sup>4</sup> 347 Ill. App. 317, 106 N. E. (2d) 842 (1952). The decision was later affirmed by the Supreme Court, not in the period of this survey: 415 Ill. 385, 114 N. E. (2d) 404 (1953).

<sup>5</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 139.



of *eiusdem generis*, held the general words at the end of the statute were to be controlled by the prior specific words, hence a conspiracy to keep book was not an actionable conspiracy. In support of that holding, the court pointed to the fact that the actual keeping of a book was an offense already prohibited as a misdemeanor.<sup>6</sup> If the defendants were to be held on a conspiracy charge, the range of prospective prosecution would become extremely broad, even to the point where two people who had decided to become intoxicated, or to go fishing without first obtaining licenses, would be subject to indictment.

The Uniform Narcotic Act, as adopted in this state,<sup>7</sup> was tested and construed in two cases. Constitutionality of the section providing for aggravated punishment for repeaters<sup>8</sup> was challenged in *People v. Hightower*,<sup>9</sup> wherein the defendant had been sentenced to serve up to fifty years in the penitentiary as a repeater. The challenge was based on the technical ground that the bill had not been passed by the legislature in accordance with the constitutional requirement that every bill should be read at large on three different days in each house.<sup>10</sup> The legislative record on the particular section showed that the measure, a house bill, had been amended on second reading, had proceeded to a third reading, and had been given three readings in the state senate. The Supreme Court, acting on the basis that the modifications in the bill were germane to the original subject matter, held that three complete readings of the amended bill in each house were not necessary,<sup>11</sup> hence the amended bill became a valid law and the sentence thereunder was proper.

The second narcotics case yielded a definition of the "subsequent offense" for which a guilty prisoner may suffer an increased penalty. Prior to 1951, it was the law that a repeater could be subjected to a higher penalty even though the first offense

<sup>6</sup> *Ibid.*, Ch. 38, § 336.

<sup>7</sup> *Ibid.*, Ch. 38, § 192.1 et seq.

<sup>8</sup> *Ibid.*, Ch. 38, § 192.23.

<sup>9</sup> 414 Ill. 537, 112 N. E. (2d) 126 (1953).

<sup>10</sup> Ill. Const. 1870, Art. IV, § 13.

<sup>11</sup> See *Giebelhausen v. Daley*, 407 Ill. 25, 95 N. E. (2d) 84 (1950).

had been no more than a misdemeanor.<sup>12</sup> Whether this rule continued was apparently made the subject of some doubt by an amendment adopted in that year which provided that any offense under the act was to be regarded as a "subsequent offense" if the violator had been "previously convicted of a felony under any law of the United States of America, or of any State or Territory . . . relating to narcotic drugs."<sup>13</sup> The case of *People v. Shamery*<sup>14</sup> now indicates that one who has been convicted of a narcotics misdemeanor prior to the 1951 amendment, and is again convicted for a narcotics crime thereafter, is to be regarded as a subsequent offender, hence liable to the full increased penalty. It would, therefore, appear that the court interpretation has supplemented rather than replaced the old rule.

The law relating to narcotic drugs<sup>15</sup> has also now been armed with stronger enforcement provisions. In the first place, every drug addict is required, under penalty, to register with the Department of Registration and Education, and to carry his registration card with him at all times.<sup>16</sup> A search warrant may be procured by "any person," not simply by an officer, if such person reasonably suspects unlawful possession of narcotic drugs.<sup>17</sup> The penalty for the first offense of selling, etc., is now fixed at imprisonment for a period of from two years to life,<sup>18</sup> rather than the former comparatively short period of from one to five years. An illegal sale has been classed with other offenses for which there may be prosecution and punishment under the law relating to habitual criminals<sup>19</sup> and the same conduct has been included in the definition of infamous crimes.<sup>20</sup>

<sup>12</sup> Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 192.23.

<sup>13</sup> Laws 1951, pp. 90-1; Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 192.23.

<sup>14</sup> 415 Ill. 177, 112 N. E. (2d) 466 (1953). Maxwell, J., wrote a dissenting opinion. Cert. den. — U. S. —, 74 S. Ct. 55, 98 L. Ed. (adv.) 47 (1953).

<sup>15</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 192.1 et seq.

<sup>16</sup> Laws 1953, p. 355, H.B. 698; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 192.29 et seq.

<sup>17</sup> Laws 1953, p. 1531, H.B. 699; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 192.16 and § 692. Under the former provisions, the application for a search warrant had to be made by a police officer or by an employee of the Department.

<sup>18</sup> Ibid., p. 1531, H.B. 699; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 192.23.

<sup>19</sup> Laws 1953, p. 1530, H.B. 652; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 602.

<sup>20</sup> Laws 1953, p. 1529, H.B. 651; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 587.

Other much needed changes in the substance of the criminal law have been made by the legislature. The revised law relating to prosecutions for perjury now provides that, in every indictment for perjury, it shall be sufficient to allege the giving of contradictory statements under oath, on those occasions when an oath is required by law, without alleging in the indictment which of the statements is true and which false.<sup>21</sup> It has also been provided, in a newly added section,<sup>22</sup> that presumptive proof of falsity is made by proof of such contradictory statements on the same basis. The new section does, however, contain a proviso to the effect that, where the contradictory testimony occurs in the same continuous trial, the witness' admission of prior untruthfulness, coupled with subsequent truthful testimony, shall constitute a complete defense, at least to the extent that the untruthful statement has been corrected.

An incongruity existing in the law relating to burglary has been eliminated. Although the common-law requirement that the crime of burglary ought to be committed in the night-time had been deleted in the statutory definition of that offense,<sup>23</sup> it had been retained in the section dealing with attempted burglary.<sup>24</sup> As a consequence, it was held, in the case of *People v. Glickman*,<sup>25</sup> that an indictment for attempted burglary would be fatally defective unless it alleged that the acts were done at night. The rule of that case has now been avoided by an amendment designed to bring the two sections into harmony with each other.<sup>26</sup>

Changes in the Criminal Code appear to reflect the high cost of living. For example, the critical value which determines whether the crime of receiving stolen property is to be punished as a felony or a misdemeanor has been raised from fifteen dollars to

<sup>21</sup> Laws 1953, p. 30, S.B. 96; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 475.

<sup>22</sup> Ibid. See also Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 475a.

<sup>23</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 84.

<sup>24</sup> See Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 85.

<sup>25</sup> 377 Ill. 360, 36 N. E. (2d) 720 (1941). A note thereon in 21 CHICAGO-KENT LAW REVIEW 41 gives details as to the legislative history.

<sup>26</sup> Laws 1953, p. 1533, H.B. 725; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 85.

fifty dollars.<sup>27</sup> By this amendment, the larceny<sup>28</sup> and receiving sections form a more coherent pattern, but it is to be noted that the critical value of fifteen dollars as yet remains unchanged in the section relating to the alteration of the brand or mark of a domestic farm animal with intent to steal the same.<sup>29</sup> It might also be noticed at this point that the matter of attorney's fees has not been overlooked for the maximum fee allowable to counsel seeking review on behalf of certain indigent criminal defendants has been increased.<sup>30</sup>

Beside making changes in existing laws, the legislature has added certain new offenses to the Criminal Code. It is now criminal to abandon refrigerators in places accessible to children;<sup>31</sup> to engage in indecent exhibitions;<sup>32</sup> to wear certain organizational insignia without authority;<sup>33</sup> and to deposit rubbish on ice of waters of this state.<sup>34</sup>

In the realm of criminal procedure,<sup>35</sup> it might be noted that the immunity provisions of the Cigarette Tax Act<sup>36</sup> were held constitutional in the case of *Halpin v. Scotti*.<sup>37</sup> The Director of Revenue there sought to compel the defendant to answer certain questions in connection with an investigation he was conducting, but his request was denied in the trial court, apparently on the ground the immunity clause violated the defendant's privilege against self-incrimination. The Supreme Court, holding the provision to be valid, reversed and remanded with directions on the ground the statute was broad enough to protect the witness

<sup>27</sup> Laws 1953, p. 353, H.B. 109; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 492.

<sup>28</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 389.

<sup>29</sup> *Ibid.*, Ch. 38, § 446.

<sup>30</sup> Laws 1953, p. 156, S.B. 109; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 730a. The prior figure of \$250 has been changed to \$1,000.

<sup>31</sup> Laws 1953, p. 869, S.B. 397; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 96.1.

<sup>32</sup> Laws 1953, p. 1532, H.B. 719; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 159a.

<sup>33</sup> Laws 1953, p. 352, H.B. 11; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 269e. See also a companion measure in Laws 1953, p. 434, H.B. 798, listed in Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 269g.

<sup>34</sup> Laws 1953, p. 157, H.B. 150; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 433a.

<sup>35</sup> Cases involving matters of proof in criminal cases have been discussed above. See Civil Practice and Procedure, sub-topic The Trial of the Case, particularly notes 48 to 53.

<sup>36</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 453.10a.

<sup>37</sup> 415 Ill. 177, 112 N. E. (2d) 466 (1953).

against all future punishment for any offense to which the evidence related.

The sufficiency of the indictment was called into question in two cases. In one of them, that of *People v. Gibbs*,<sup>38</sup> it appeared from the record that the grand jury had been discharged and had then reconvened during the same term prior to the returning of the indictment in question. There was, however, no entry in the record of an order recalling the jury. After the indictment had been quashed for the sole reason that the grand jury could only have been properly reconvened by order of court duly entered of record, the prosecution sought a writ of error. Although counsel for the defendant did not seriously argue the point, and conceded that the Criminal Code was directory only in this regard,<sup>39</sup> the Supreme Court explicitly stated that the entry of a recall order was not jurisdictional, since the right of a regularly constituted grand jury to reconvene could not be said to be dependent on such an order, and the legislative purpose was to provide no more than a convenient *modus operandi* for the guidance of the proper officials. In the second case, that of *People v. Kohler*,<sup>40</sup> the court made short shrift of the defendant's somewhat incredible argument that an information charging "sexual relations" with a child did not sufficiently state the statutory offense of contributing to the delinquency of a minor<sup>41</sup> because the statute did not use that phrase in defining delinquency.

The power of the Attorney General to *nolle prosequere* a criminal case was considered at length in *People ex rel. Elliott v. Covelli*.<sup>42</sup> It appeared there that, after the trial judge had sustained a motion by the defendant to suppress the evidence against him, the Attorney General moved to *nolle* on the ground the prosecution, under this ruling, would lack sufficient competent evidence to

<sup>38</sup> 413 Ill. 154, 108 N. E. (2d) 446 (1952).

<sup>39</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 713, provides that, if members of the grand jury are dismissed, they may be summoned again at such times during the term as the court may direct.

<sup>40</sup> 413 Ill. 283, 109 N. E. (2d) 210 (1952).

<sup>41</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 103.

<sup>42</sup> 415 Ill. 79, 112 N. E. (2d) 156 (1953), noted in 42 Ill. B. J. 188.

make out a case. When the trial judge refused to honor this motion, the Attorney General sought an original writ of mandamus from the Supreme Court to compel the trial judge to enter the requested order, thereby prompting an examination into the constitutional powers of the Attorney General. By granting the peremptory writ, and holding that he had discretionary power in the matter except as to cases of abusive repetition, the court adopted the view that the Illinois constitutional provision creating the office of Attorney General<sup>43</sup> operated to bestow on that official all the common-law powers of the office, including the one in question, and that he could not be denied the right to exercise these powers. The court noted that, to permit a judge to refuse to enter the order sought in the instant case, would constitute an unconstitutional encroachment by the judiciary on the powers of the executive branch of the government.

Two cases involving sentencing procedure are worthy of note. The power of a judge, rather than a jury, to fix punishment under the Motor Vehicle Act<sup>44</sup> was established in *People v. Davis*.<sup>45</sup> Although the general section of the Criminal Code provides that, in cases tried before a jury, the sentence shall be fixed by the jury,<sup>46</sup> there is nothing in the statute to indicate whether this rule is to apply to prosecutions based on other independent statutes imposing penalties. The Appellate Court for the Third District, making analogy to cases under the Medical Practice Act,<sup>47</sup> took the view that the sentence-fixing procedure mentioned in the Criminal Code applied only to offenses named therein, leaving the trial judge free to impose sentence in matters arising under other statutes.

Power to impose consecutive sentences was dealt with in another new case, that of *People v. Stingely*.<sup>48</sup> There the defend-

<sup>43</sup> Ill. Const. 1870, Art. V, § 1.

<sup>44</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 145.

<sup>45</sup> 349 Ill. App. 398, 110 N. E. (2d) 833 (1953).

<sup>46</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 754a.

<sup>47</sup> See *People v. Mainard*, 348 Ill. App. 53, 107 N. E. (2d) 878 (1952); *People v. O'Dell*, 343 Ill. App. 395, 99 N. E. (2d) 367 (1951).

<sup>48</sup> 414 Ill. 398, 111 N. E. (2d) 548 (1953), cert. den. 345 U. S. 959, 73 S. Ct. 945, 97 L. Ed. 850 (1953).

ant, having waived jury trial, was tried by a court under an indictment in two counts, charging assault with intent to rape and assault with intent to murder. He was found guilty on both counts and sentenced to serve from ten to fourteen years on each, the terms to run consecutively. On writ of error, the defendant contended that such procedure subjected him to double jeopardy and denied him due process of law. Arguing *pro se*, he persuaded the Supreme Court to hold that his sentences had to run concurrently. The court recognized the rule of the federal courts which permits the imposition of consecutive sentences under a multiple-count indictment. It also acknowledged the well-established rule that two separate indictments for distinct offenses arising out of closely connected facts would justify the imposition of consecutive sentences. The court, however, appears to have thought it significant that the two charges were included in the same indictment, albeit in separate counts, and relying upon some Illinois dicta it concluded that the prosecution was entitled to only one satisfaction.

Two cases presented problems arising in connection with unjustified delay, on the part of public officials, in bringing about the confinement of convicted persons, with resultant delay in the completion of the term of imprisonment. In one of these, the case of *People ex rel. Ellis v. Babb*,<sup>49</sup> the established rule that a sentence of punishment for crime is to be regarded as satisfied only by actual service found an unusual and rather harsh application. It appeared therein that the prisoner had been convicted of robbery in 1944 and had been released on probation. Later, in 1945, during the probationary period, he was convicted of larceny before another court and sentenced to one year of imprisonment in a county jail. Shortly after this commitment, his probation was revoked and he was sentenced to the penitentiary for participation in several robberies, which sentence he fully served. Some five years after his discharge from the penitentiary, he was re-arrested and re-committed to the county jail to complete the service of the one-year sentence. Denying a petition for habeas corpus, the

<sup>49</sup> 412 Ill. 601, 107 N. E. (2d) 725 (1952).

court relied on the comparable case of *People ex rel. Kerner v. McKinley*,<sup>50</sup> one wherein the defendant had been compelled to complete an earlier and interrupted sentence, and pointed out that default on the part of a public official could not create a right in the prisoner to be discharged. In *United States ex rel. Meiner v. Ragen*,<sup>51</sup> the Court of Appeals for the Seventh Circuit affirmed a denial of a petition for a writ of habeas corpus, holding that, in view of the Illinois law, the arrest of the petitioner outside of Illinois for parole violations and his return to the state to complete the service of his sentence would not violate due process requirements notwithstanding a fourteen-year delay between issuance of the warrant and actual arrest.

Attention ought to be called to one case illustrating the workings of the Post Conviction Hearing Act.<sup>52</sup> After an earlier commitment to an asylum for insanity, the petitioner in *People v. Reeves*<sup>53</sup> was returned to the jurisdiction of the trial court on a petition by an assistant public defender alleging recovery from insanity to such a degree that the defendant could be tried. A jury was empanelled to determine the question of sanity and, on the basis of a statement by the assistant public defender, the judge directed a verdict of sanity. Trial and conviction for murder followed, with a long-term sentence to imprisonment. The prisoner then contended, under the Post Conviction Hearing Act, that he had been denied his constitutional right to counsel because the attorney assigned to represent him had displayed unusual incompetence.<sup>54</sup> When confronted with this petition, the trial court sustained a motion to dismiss filed by the prosecution. On writ of error, the Supreme Court reversed, deciding that the allegations of the petition, if established, were sufficient to overcome the

<sup>50</sup> 371 Ill. 190, 20 N. E. (2d) 498 (1939).

<sup>51</sup> 199 F. (2d) 798 (1952).

<sup>52</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 826 et seq.

<sup>53</sup> 412 Ill. 555, 107 N. E. (2d) 861 (1952), noted in 41 Georgetown L. J. 282.

<sup>54</sup> The incompetence charged was said to consist of (1) a failure to object to the introduction of a confession obtained while the defendant was insane; (2) a failure to object to evidence of a previous conviction; (3) a failure to present to the jury the fact of the petitioner's prior adjudication of insanity and the irregularity of the proceeding in which he was determined to be sane for the purpose of the murder trial; and (4) a failure to confer with the petitioner until the day of trial.



usual presumption of competence of counsel, hence did present a constitutional issue which the prisoner was entitled to have considered, as he could not be said to be competent to waive the same.

Challenge to the validity of the appointment of a criminal court judge was made via habeas corpus in the case of *United States ex rel. Scott v. Babb*,<sup>55</sup> heard before the Court of Appeals for the Seventh Circuit. The petitioner, sentenced to death for murder by the Criminal Court of Cook County, claimed that the judge before whom he had been tried had never subscribed to an oath that he would faithfully discharge the duties of judge of that court and that this omission led to a violation of requirements in the state and federal constitutions.<sup>56</sup> The judge in question had been duly elected, qualified, and sworn as a judge of the Circuit Court of Cook County and had, from there, been assigned to serve in the Criminal Court. The Supreme Court of Illinois, on appeal from the conviction, had held that the judge's assignment to duty was sufficient to qualify him without the necessity of taking any other oath of office.<sup>57</sup> The Court of Appeals, apparently considering the federal question for the first time, also held that a second oath was not necessary inasmuch as the judge was, *virtute officii*, a member of the bench of the court in question and was not a new judicial officer.

Some important legislative procedural changes have also been made. Most significant is the enactment into law of the suggestions offered by the Crime Commission relating to the granting of immunity to state's witnesses. The new immunity section<sup>58</sup> provides that, whenever it appears to the court that any material witness may produce incriminating evidence, the State's Attorney may cause an order to be entered in the record releasing such witness from all liability from prosecution "on account of any transaction, matter or thing concerning which he may be required

<sup>55</sup> 199 F. (2d) 804 (1952), cert. den. 344 U. S. 935, 73 S. Ct. 507, 97 L. Ed. 443 (1953).

<sup>56</sup> Ill. Const. 1870, Art. V, § 25; U. S. Const., Art. VI, clause 3.

<sup>57</sup> See *People v. Lindsay*, 412 Ill. 472, 107 N. E. (2d) 614 (1952).

<sup>58</sup> Laws 1953, p. 31, S.B. 97; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 580a.

to testify or produce evidence, documentary or otherwise.”<sup>59</sup> The refusal by a witness, granted this immunity, to give testimony would constitute a punishable contempt. It may be expected that the new section will facilitate the discovery of much information which otherwise would have been kept concealed. Another statute permits a criminal defendant to make a preliminary motion for the suppression of an alleged confession which he believes to be incompetent.<sup>60</sup> A third makes the writ of error a writ of right in all criminal cases<sup>61</sup> while also providing that a supersedeas shall be issued as a matter of course in those cases where the sentence is death.

It can also be expected that some sentencing and parole procedures will change hereafter. Definitive action has been taken by the legislature to revamp existing methods for the handling of youthful offenders. Succeeding to part of the supervisory role formerly occupied by the Department of Welfare, a newly-created Youth Commission is to be established with the two-fold purpose of (1) conserving the human resources in the youth of the state, and (2) protecting society by more effectively preventing delinquency or in rehabilitating those found delinquent.<sup>62</sup> The most important feature of the new legislation lies in the power given the Commission to issue such orders for the treatment of individuals committed to it as are, within defined limits, deemed best suited to the needs of the individual and to the interest of the public.<sup>63</sup>

This reform scheme is paralleled by other changes in the sentencing and parole sections of the Criminal Code. While resort to the indeterminate sentence has become a familiar principle,<sup>64</sup>

<sup>59</sup> The Supreme Court, in the case of *Halpin v. Scotti*, 415 Ill. 104, 112 N. E. (2d) 91 (1953), noted above in this section at note 37, upheld the constitutional validity of an immunity provision in the Cigarette Tax Act couched in similar language.

<sup>60</sup> Laws 1953, p. 1166, S.B. 622; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 736.1.

<sup>61</sup> Laws 1953, p. 78, S.B. 91; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 769.1. See also *ibid.*, Ch. 38, § 772.1, which describes the procedure to be followed in order to obtain a supersedeas in other criminal cases.

<sup>62</sup> Laws 1953, p. 620, S.B. 276; Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 220d1 et seq.

<sup>63</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 220d.11.

<sup>64</sup> *Ibid.*, Ch. 38, § 802, providing for such sentences, excepts those cases listed in Section 801 thereof. In the excepted cases, determinate sentences are to be given.

fixed or determinate sentences have heretofore been given in cases of conviction for misprision of treason, murder, rape or kidnapping. The crime of voluntary manslaughter has now been added to the list.<sup>65</sup> Over persons who might be sentenced to fixed terms under the latter rule, the Youth Commission will apparently have no jurisdiction for there is no provision allowing commitment of such persons to that body. Where an indeterminate sentence might be given, however, the youthful offender, found guilty after December 31, 1953, is to be sent to the Youth Commission with no fixed term, but to be held subject to the orders of the Commission for a period not longer than the maximum term fixed by law for the offense involved.<sup>66</sup>

In conclusion, it may be mentioned that a new condition has been added to the list of terms on which a convict may be released on parole. The legislature has now provided that, in the case of a man released on an out-of-state parole, it shall be a condition of the release that the parolee shall not violate any law or ordinance of the other state.<sup>67</sup>

## V. FAMILY LAW

Considerable activity, both in the form of judicial decisions and legislative action, may be noted in the field of family law. Among the new decisions is the case of *Brown v. Glickstein*,<sup>1</sup> wherein a question as to whether or not a malicious interference with a contract to marry would give rise to a cause of action on behalf of the injured party was considered for the first time in this state by the Appellate Court for the First District. That court affirmed the dismissal of such a suit, in line with the

<sup>65</sup> Laws 1953, p. 1529, H.B. 651; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 801.

<sup>66</sup> In the event the maximum term would expire after the youth reached the age of 21, the control of the Youth Commission is to terminate at that point but the convicted person is then to be transferred to the penitentiary or to the reformatory, to become subject to the supervision of the Parole and Pardon Board. See Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 803.1, and Ch. 23, § 220d.23.

<sup>67</sup> Laws 1953, p. 1527, H.B. 545; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 787(1).

<sup>1</sup> 347 Ill. App. 486, 107 N. E. (2d) 267 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 175.

majority of cases on the point,<sup>2</sup> on the ground that the fullest freedom ought to be permitted to interested third parties in the giving of advice with respect to a pending marriage in order best to insure the permanence of the subsequent marital relationship. While the case actually concerned close relatives, the court appears to have assumed this freedom would extend to all third parties, with no distinction being made between one who responds upon inquiry and one who maliciously volunteers information.

The validity of a marriage appears to have been brought into question, in the case of *Haderaski v. Haderaski*,<sup>3</sup> on the ground that no license for the celebration thereof had been procured.<sup>4</sup> There was evidence, however, that a religious ceremony had been performed by a qualified member of the clergy. Treating the license provision as being merely directory for this purpose,<sup>5</sup> the Supreme Court held the marriage valid, treating the case before it as being no different than those in which other licensing provisions had been disregarded.<sup>6</sup>

The concluding chapter in the case of *Sutton v. Leib*<sup>7</sup> seems to have been written by the decision of the Court of Appeals for the Seventh Circuit. That court held that the divorced husband in question had, at no time, been excused from his obligation to pay alimony ordered paid by a court decree, notwithstanding the fact that his divorced spouse had, for a time, enjoyed support from an alleged new husband who, by reason of the invalidity of his Nevada divorce, was found to be legally incapable of entering into a matrimonial union with her. The holding in the case of *Lehmann v. Lehmann*<sup>8</sup> was there distinguished on the ground the interven-

<sup>2</sup> See, for example, *Conway v. O'Brien*, 269 Mass. 425, 169 N. E. 491, 73 A. L. R. 1448 (1929).

<sup>3</sup> 415 Ill. 118, 112 N. E. (2d) 714 (1953).

<sup>4</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 89, § 6, in part, provides that all "persons about to be joined in marriage must first obtain a license."

<sup>5</sup> *Ibid.*, Ch. 89, § 15, merely provides for a penalty to be imposed on the officiant who performs the ceremony without ascertaining whether or not a license has been obtained.

<sup>6</sup> See, for example, *Boysen v. Boysen*, 301 Ill. App. 573, 23 N. E. (2d) 231 (1939), noted in 18 CHICAGO-KENT LAW REVIEW 206.

<sup>7</sup> 199 F. (2d) 163 (1952), noted in 41 Georgetown L. J. 263, 4 Syracuse L. Rev. 387, and 27 Tulane L. J. 485. Earlier aspects of the case were discussed in 30 CHICAGO-KENT LAW REVIEW 266.

<sup>8</sup> 225 Ill. App. 513 (1922).

ing marriage concerned in that case was voidable rather than void. The controlling statute must, therefore, hereafter be read as if it stated, in express terms, that the successful party is not to be entitled to recover additional periodic alimony after contracting a valid remarriage.<sup>9</sup>

Several new questions were presented concerning the law of separate maintenance and divorce. The case of *Ribergaard v. Ribergaard*,<sup>10</sup> decided by the Appellate Court for the Second District in apparent conflict with a view expressed elsewhere in the state,<sup>11</sup> purports to establish an exception to the general rule that property rights are not to be adjusted in separate maintenance proceedings. In that case, both the plaintiff and the defendant requested a declaration as to their property rights and each introduced evidence with respect thereto. Under the circumstances, it was considered to be proper for the court to adjudicate these rights and enter a decree accordingly, but it might be noted that no action was taken with respect to their jointly owned real estate.

An apparently novel question was raised in the divorce proceeding entitled *Vancuren v. Vancuren*<sup>12</sup> having to do with the applicability of Section 2 of the Evidence Act<sup>13</sup> to a divorce case. After the husband therein had obtained a divorce for desertion, with jurisdiction based upon service by publication, the defendant-wife brought a proceeding to set aside the decree.<sup>14</sup> The plaintiff died before a hearing on the merits could be had and the husband's administrator was substituted as party plaintiff. When the trial court ultimately found that the plaintiffs had failed to prove the charge of desertion by a preponderance of evidence, the original decree of divorce was vacated and the suit was ordered

<sup>9</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, § 19.

<sup>10</sup> 349 Ill. App. 99, 110 N. E. (2d) 89 (1953).

<sup>11</sup> See, for example, the decision of the Appellate Court for the First District in the case of *Petta v. Petta*, 321 Ill. App. 512, 53 N. E. (2d) 324 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 281.

<sup>12</sup> 348 Ill. App. 351, 109 N. E. (2d) 225 (1952). Leave to appeal has been denied.

<sup>13</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 51, § 2.

<sup>14</sup> *Ibid.*, Vol. 2, Ch. 110, § 174(8), authorizes relief in this fashion if the application is made in apt time.

dismissed. It was urged, on appeal, that the applicable section of the Evidence Act operated to bar the defendant from testifying in her own behalf, but the Appellate Court for the Third District held the testimony competent, relying on the ground that a statutory exception exists where the deposition of the deceased is read into evidence. While the husband's testimony, as preserved in the record, was not exactly a deposition, the court treated it as one since it had much the same force and effect. To give effect to the testimony of the deceased husband with regard to the desertion without allowing the defendant to testify would have led to a gross injustice.

With respect to matters arising subsequent to divorce,<sup>15</sup> it might be noted that the statute allowing a court to award appellate expense money and temporary alimony pending an appeal received interpretation in the case of *Riddlesbarger v. Riddlesbarger*.<sup>16</sup> The plaintiff there had obtained a divorce and had successfully defended the decree on appeal. The defendant then hastily satisfied the judgment based on the decree. Shortly thereafter, the plaintiff filed her petition seeking an allowance of an additional sum for attorney's fees and expenses on which judgment went against the defendant. Dealing directly with the defendant's argument to the contrary, the Appellate Court held that, under a fair construction of the statute, it was not necessary for the plaintiff to file her petition for additional expenses during the pendency of the appeal since it would have been unreasonable to require her to seek recompense at a time when the amount of her expense had not then been determined.

The jurisdiction of a divorce court to modify a decree with respect to the custody of minor children of the divorced parents was declared to be a continuing jurisdiction,<sup>17</sup> not one terminated

<sup>15</sup> The case of *Pokorney v. Pokorney*, 348 Ill. App. 364, 109 N. E. (2d) 254 (1952), dealing with the right of a court to refer a petition for reduction of alimony to a special commissioner for hearing, has been noted above. See Civil Practice and Procedure, particularly note 79. The legislature has also acted to limit the fees payable to masters in chancery for hearing petitions for temporary separate maintenance: Laws 1953, p. 1571, H.B. 991; Ill. Rev. Stat. 1953, Vol. 1, Ch. 68, § 22.

<sup>16</sup> 348 Ill. App. 31, 107 N. E. (2d) 770 (1952). Cause transferred, 410 Ill. 329, 102 N. E. (2d) 319 (1951).

<sup>17</sup> See Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, § 19.

by the death of one of the divorced parents, under the Supreme Court decision in the case of *Jarrett v. Jarrett*.<sup>18</sup> That jurisdiction was, however, in the case of *People ex rel. Houghland v. Leonard*,<sup>19</sup> forced to yield before the concurrent jurisdiction of a county court over proceedings based on the Juvenile Court Act.<sup>20</sup> Treating the question as one of first impression, the Supreme Court there pointed out that a dissimilarity exists between the issues raised in a divorce case, where the fitness of the parents for purpose of custody is primarily in issue, in contrast to those engendered in proceedings under the Juvenile Court Act, where the issue is whether the behavior of the child requires intervention on the part of the state. This basic dissimilarity, the court said, justified the exercise of the concurrent jurisdiction regardless of the prior continuing jurisdiction of the divorce court.

The law of torts between the spouses, after a long period of uncertainty, has at last become certain in one respect. It will be recalled that, under the decision reached by the Appellate Court for the First District in *Brandt v. Keller*,<sup>21</sup> the spouse there suing was denied the right to recover against the other spouse for tortious conduct resulting in personal injury. On further appeal, however, the Supreme Court reversed,<sup>22</sup> holding that the Married Women's Acts operated to remove the common-law rule of immunity. Particular emphasis was placed upon that part of the statute which states that a married woman may, "in all cases, sue and be sued without joining her husband with her, to the same extent as if she were married."<sup>23</sup> Although the Appellate Court had concluded that the phrase "in all cases" referred to suits against third parties, the Supreme Court held that a more liberal construction was called for. The decision thus reached

<sup>18</sup> 415 Ill. 126, 112 N. E. (2d) 694 (1953), noted in 31 CHICAGO-KENT LAW REVIEW 373, affirming 348 Ill. App. 1, 107 N. E. (2d) 622 (1952).

<sup>19</sup> 415 Ill. 135, 112 N. E. (2d) 697 (1953).

<sup>20</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 190 et seq.

<sup>21</sup> 347 Ill. App. 18, 105 N. E. (2d) 796 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 343.

<sup>22</sup> See 413 Ill. 503, 109 N. E. (2d) 729 (1953), noted in 2 DePaul L. Rev. 285, 41 Ill. B. J. 330, 1953 Ill. L. Forum 150, and 48 Northwestern L. Rev. 75.

<sup>23</sup> Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, § 1.

followed in logical sequence upon the holding in *Welch v. Davis*,<sup>24</sup> wherein it was said that an action for wrongful death could be maintained against the estate of the husband responsible therefor, and that attained in *Tallios v. Tallios*,<sup>25</sup> a case indicating that a wife could have a cause of action against the employer of her husband for injuries arising from the husband's negligent conduct in the course of his employer's business.

It can only be said, however, that the legislature appears not to have been satisfied with the final decision in the Brandt case, for it acted promptly to restore the common-law rule. The statute in question was amended, in 1953, by the addition of a proviso to the effect that "neither husband nor wife may sue the other for a tort to the person committed during coverture."<sup>26</sup> Even if it accomplished nothing more, the Supreme Court decision at least served the useful purpose of provoking legislative clarification on a point much in doubt. If the proviso should be interpreted to leave the holdings in the Welch and Tallios cases untouched, for they do not appear to be expressly covered thereby, the law would remain in an illogical state, so additional legislative clarification would appear still to be in order.

Rights of infants were considered in three cases. In the first, that of *Noel v. Olszewski*,<sup>27</sup> the court insisted upon a rigid compliance with the statutory requirement that a child over the age of fourteen years, in order to be validly adopted in Illinois, had to appear in open court and there personally acknowledge his written consent.<sup>28</sup> As the infants in question were living in Poland at the time the adoption decree was entered, the decree was adjudged to be void. The other two cases dealt with the right of

<sup>24</sup> 410 Ill. 130, 101 N. E. (2d) 547 (1951).

<sup>25</sup> 345 Ill. App. 387, 103 N. E. (2d) 507 (1952). It is of interest to note that, on remand, the trial court found the wife to be a guest within the meaning of Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 58a, hence not entitled to recover as a matter of fact although her complaint had been held to state a cause of action in law. This decision was affirmed in 350 Ill. App. 299, 112 N. E. (2d) 723 (1953). Leave to appeal was thereafter denied.

<sup>26</sup> Laws 1953, p. 437, S.B. 194; Ill. Rev. Stat. 1953, Vol. 1, Ch. 68, § 1.

<sup>27</sup> 350 Ill. App. 264, 112 N. E. (2d) 727 (1953), noted in 31 CHICAGO-KENT LAW REVIEW 372. Leave to appeal has been denied.

<sup>28</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 4, § 3—3.



an infant to recover for prenatal injuries. In *Amann v. Faidy*,<sup>29</sup> the administratrix of the deceased infant, on behalf of the next of kin, sought to recover for the child's death produced as a result of prenatal injuries. The action was stricken, and this decision was affirmed, on the basis of the earlier Supreme Court holding in the case of *Allaire v. St. Luke's Hospital*.<sup>30</sup> The Appellate Court for the Second District, while giving recognition to the fact that a number of recent decisions elsewhere had allowed such an action, there expressed the belief it did not have authority to declare the Supreme Court decision erroneous. The case of *Rodriguez v. Patti*,<sup>31</sup> arising in the First District, although involving an action by an infant, suing by next friend, to recover for his own prenatal injury, achieved a similar result.

Questions concerning reciprocal obligations of family members to support their relatives, as demanded by the recently enacted Mental Health Code,<sup>32</sup> were considered in *Kough v. Hoehler*.<sup>33</sup> The plaintiffs there brought a proceeding to enjoin enforcement of those provisions of the Code which purported to charge the costs of detention, care, and treatment of patients in state hospitals to the patients, their estates, or to their relatives.<sup>34</sup> It was said that the statute was unconstitutional since it arbitrarily exempted mentally ill persons in custody on criminal charges by excluding them.<sup>35</sup> The classification scheme was, however, considered to be reasonable by the Supreme Court. It explained that the public possessed a vital interest in the confinement of persons in the category of criminally insane, since they were held primarily for the protection of society, whereas no such direct interest

<sup>29</sup> 348 Ill. App. 37, 107 N. E. (2d) 868 (1952). The Supreme Court, not in the period of this survey, reversed and held the complaint sufficient: 415 Ill. 422, 114 N. E. (2d) 412 (1953). It appears to have treated the complaint as one presenting a case of injuries which, while inflicted prenatally, caused the child's death at a time subsequent to its birth alive.

<sup>30</sup> 184 Ill. 359, 56 N. E. 638 (1900).

<sup>31</sup> 348 Ill. App. 322, 108 N. E. (2d) 830 (1952). Reversal subsequent to the period of this survey may be noted in 415 Ill. 496, 114 N. E. (2d) 721 (1953).

<sup>32</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 91½, § 1—1 et seq.

<sup>33</sup> 413 Ill. 409, 109 N. E. (2d) 177 (1952), noted in 41 Ill. B. J. 330.

<sup>34</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 91½, §§ 9—19 to 9—25.

<sup>35</sup> *Ibid.*, § 1—8.

existed with regard to other persons who were being treated in state hospitals primarily for their own health and welfare, or for that of their relatives.

A fair degree of legislative activity in the realm of family law may also be noted. Most widely publicized of the new measures relating to divorce is the new "cooling-off period" act,<sup>36</sup> one which requires a person intending to commence an action for divorce, separate maintenance, or annulment of marriage, to file a written statement of such intention with the clerk of the court sixty days before the complaint is actually filed in order to permit the utilization of reconciliation measures. The court may waive the requirement in cases where immediate action is necessary. To facilitate action thereunder, counties and cities are authorized to employ qualified administrative aids to assist the appropriate courts in the administration of divorce, separate maintenance, and annulment proceedings.<sup>37</sup>

Section 1 of the act relating to separate maintenance<sup>38</sup> has been amended to permit the court, on application of either party, to make such order concerning the custody and care of minor children of the parties during the pendency of the cause as may be deemed expedient and for the benefit of the child. The legislature has also acted to delete that part of the section, added by amendment in 1935, heretofore held unconstitutional,<sup>39</sup> which purported to limit the granting of separate maintenance to a period of two years and declared the separation, in certain instances, to be desertion for purpose of divorce. In regard to other matters concerning support, certain statutory provisions now make both husband and wife responsible.<sup>40</sup>

<sup>36</sup> Laws 1953, p. 284, S.B. 407; Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, §§ 23-9. See also Miner, "The 60-Day Cooling Off Period," 41 Ill. B. J. 636 (1953).

<sup>37</sup> Laws 1953, p. 1011, S.B. 646; Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, §§ 7a-7c.

<sup>38</sup> Laws 1953, p. 1571, H.B. 991; Ill. Rev. Stat. 1953, Vol. 1, Ch. 68, § 22.

<sup>39</sup> See *DeMotte v. DeMotte*, 364 Ill. 421, 4 N. E. (2d) 960 (1936).

<sup>40</sup> The Uniform Support of Dependents Act has been changed to define "dependent" so as to include both spouses: Laws 1953, p. 246, S.B. 250, Ill. Rev. Stat. 1953, Vol. 1, Ch. 68, § 51(d). In much the same way, the Public Assistance Code now includes spouses in the definition of responsible relatives: Laws 1953, p. 236, S.B. 251, Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, §§ 436—12 and 439—2. The Wife and Child Abandonment Act now puts both spouses under the sanctions thereof: Laws 1953,

Two newly added sections modify the procedural law with respect to adoptions. One of these empowers the court to appoint a state's attorney, or other licensed attorney, to serve as guardian *ad litem* to represent the mentally ill parents of a child about to be adopted and to give consent in their behalf. The power is limited to cases of long-continued mental illness wherein it would appear that no cure is likely to occur in the foreseeable future.<sup>41</sup> The other provides that a consent to adoption, once executed and duly witnessed or acknowledged, shall be irrevocable unless the same has been obtained by fraud or duress.<sup>42</sup> The provision appears to have overruled the decision in *Weisbart v. Berezin*,<sup>43</sup> a case in which it was held to be within the discretion of the trial court to permit a natural mother to revoke her consent to adoption three days after it had been filed and before final action had been taken thereon.

Another series of statutory changes would indicate that the status of an adopted child is, hereafter, to be the same as that of a natural child for many legal purposes. To this end, the adoption statute now contains a new provision having to do with the construction of instruments, one which provides that, for the purpose of determining the property rights of any person under any written instrument executed after January 1, 1954, an adopted child is to be deemed a natural child unless the contrary intent appears by the terms of the instrument.<sup>44</sup> A child lawfully adopted is also now deemed to be a descendant of the adopting parent for purposes of inheritance by and from the adopting parent and by and from the lineal and collateral kindred of the adopting parent,

p. 244, S.B. 249, Ill. Rev. Stat. 1953, Vol. 1, Ch. 68, §§ 24 and 26. It is also now made a felony for a mother to abandon her child under the age of fourteen, notwithstanding the fact that another person may have legal control or be in the position of *loco parentis* to the child: Laws 1953, p. 544, S.B. 494, Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 99.

<sup>41</sup> Laws 1953, p. 1061, H.B. 367; Ill. Rev. Stat. 1953, Vol. 1, Ch. 4, §§ 3-4½ and 4-1. For a similar provision with regard to delinquent children, see Ch. 23, § 209(4).

<sup>42</sup> Laws 1953, p. 1480, H.B. 457; Ill. Rev. Stat. 1953, Vol. 1, Ch. 4, § 3-7.

<sup>43</sup> 346 Ill. App. 445, 105 N. E. (2d) 814 (1952). See also *Dickholtz v. Littfin*, 341 Ill. App. 400, 94 N. E. (2d) 89 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 183.

<sup>44</sup> Laws 1953, p. 1059, S.B. 132; Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 165. See also Laws, 1953, p. 1137, S.B. 520; Ill. Rev. Stat. 1953, Vol. 1, Ch. 4, § 11-1.

with certain minor exceptions.<sup>45</sup> Finally, the adopted child and his adopting parent are now classed among the next of kin referred to in the statute relating to wrongful deaths.<sup>46</sup>

## VI. PROPERTY

### REAL AND PERSONAL PROPERTY

Little has been said concerning the acquisition of present rights by way of title to land in Illinois for most of the cases involving aspects of real property law were of stereotyped nature.<sup>1</sup> Two cases concerning rights arising under joint tenancy estates are, however of significance. In the first, that of *Klouda v. Pechousek*,<sup>2</sup> the decedent and the defendant held registered lands in that fashion. Desiring to convey his interest to the plaintiffs, while still retaining use and possession during his lifetime, the decedent, in his lifetime, executed a deed of his interest to plaintiffs. This deed contained a provision to the effect that it was not to be registered nor take effect until after the grantor's death, but it was, on execution, delivered to one of the grantees on behalf of all of them. Upon the grantor's death, plaintiffs began a suit to compel the Torrens registrar of titles to issue a certificate of title to them for an undivided interest in the land. The Supreme Court found no difficulty in concluding that a joint tenancy in property not under Torrens would have been severed by acts of the character pursued by the deceased, for delivery would have passed the fee immediately to the grantees with no more than a reservation of a life estate in the grantor. Although the mere delivery of a deed to Torrens property would have no effect on the legal estate, since registration is essential for this purpose, the court concluded the joint tenancy had been severed by the

<sup>45</sup> Ibid.

<sup>46</sup> Laws 1953, p. 368, H.B. 359; Ill. Rev. Stat. 1953, Vol. 1, Ch. 70, § 2.

<sup>1</sup> The decision in the case of *Hyland v. Waite*, 349 Ill. App. 213, 110 N. E. (2d) 457 (1953), in which leave to appeal has been denied, has been noted above. See Civil Practice and Procedure, sub-topic Enforcement of Judgments, particularly notes 83 to 86. The case deals with a dispute between a bona fide purchaser of real estate and another who claimed a lien thereon arising from a later judgment in a cause of action based on the Dram Shop Act.

<sup>2</sup> 414 Ill. 75, 110 N. E. (2d) 258 (1953).

delivery on the theory the unregistered deed took effect as a contract to convey, hence would be sufficient, at least in equity.

Whether severance of a joint tenancy had occurred also became the question in the case of *Schuck v. Schuck*.<sup>3</sup> Following a decree for partition entered therein, the premises were sold but, before confirmation of the sale could be had, the plaintiff, one of the joint tenants, died. On these facts, the Supreme Court held that the joint tenancy had been severed, explaining that, while a decree for partition would be interlocutory as to the mode of partition it would nevertheless be final for the purpose of determining the rights of the parties, unless an appeal was taken therefrom.<sup>4</sup> It followed that the death of one party prior to confirmation of the sale would not operate to revive the joint tenancy so disrupted.

While on the subject of joint tenancies, it might be noted that the mode of creating such estates in real property has been simplified by some new legislation which eliminates the necessity for using the services of a straw man and permits the present titleholder to convey directly to himself and another in joint tenancy.<sup>5</sup> The estate so created is to have all the effects of a common-law joint tenancy.

Rights in the use and development of real property<sup>6</sup> concerned the Appellate Court in the case of *Deer Park Civic Association v. City of Chicago*,<sup>7</sup> wherein a judgment was sought by resident property owners living within the area to declare that the defendant company had no vested right to construct a manufacturing building in a district zoned for family dwellings. It appeared that the defendant had purchased the land in question at a time when the area was zoned for manufacturing, had applied

<sup>3</sup> 413 Ill. 390, 108 N. E. (2d) 905 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 270.

<sup>4</sup> *Rabe v. Rabe*, 386 Ill. 600, 54 N. E. (2d) 518 (1944).

<sup>5</sup> Laws 1953, p. 114, S.B. 126; Ill. Rev. Stat. 1953, Vol. 1, Ch. 76, § 1(b).

<sup>6</sup> The oil and gas case of *Phoenix v. Graham*, 349 Ill. App. 326, 110 N. E. (2d) 669 (1953), is discussed hereafter in conjunction with the topic of Landlord and Tenant.

<sup>7</sup> 347 Ill. App. 346, 106 N. E. (2d) 823 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 192. Leave to appeal has been denied.

for and received a building permit just fifteen days prior to the effective date of an amendatory zoning ordinance designed to restrict the area to family dwellings, and had commenced building operations. The court, affirming a judgment for the defendant, adopted a rule which had been applied elsewhere, one which provides that a permittee is to be protected against a subsequent ordinance where either substantial construction or substantial liability has been incurred relating directly to construction. Inferentially, the court admitted that the construction, or the debt, would have to be undertaken in reliance on the permit and ought to occur between the time of issuance and the effective date of the amendatory ordinance.

One conveyancing decision is worthy of brief mention. In *Berigan v. Berigan*,<sup>8</sup> the Supreme Court announced that an unacknowledged deed is entitled to the presumption that it was executed and delivered on the date it bears.<sup>9</sup> Reliance was placed upon the decision in *Calligan v. Calligan*,<sup>10</sup> a case very nearly in point. It should be noted, however, that this rule would not apply to a release of homestead rights for such an instrument must be acknowledged to be effective.<sup>11</sup>

While there are no decisions of importance affecting the law of future interests, three important statutory changes have been made. Of prime importance, marking the end of an era of thwarted intentions, is the brief addition made to the Conveyances Act which reads: "The rule of property known as the rule in Shelley's Case is abolished."<sup>12</sup> The new provision is expressly made to apply only to wills of decedents dying, and to deeds and other written instruments executed, after the effective date,<sup>13</sup> so the ancient learning on the subject is not entirely

<sup>8</sup> 413 Ill. 204, 108 N. E. (2d) 438 (1952).

<sup>9</sup> An acknowledged deed may be read in evidence without proof of execution: Ill. Rev. Stat. 1953, Vol. 1, Ch. 30, § 34.

<sup>10</sup> 259 Ill. 52, 102 N. E. 247 (1913).

<sup>11</sup> See Ill. Rev. Stat. 1953, Vol. 1, Ch. 52, § 4.

<sup>12</sup> Laws 1953, p. 1479, H.B. 402; Ill. Rev. Stat. 1953, Vol. 1, Ch. 30, § 186. See also Schuyler, "Rule in Shelley's Case Abolished," 41 Ill. B. J. 711 (1953), and Corrigan, "Obituary for the Rule in Shelley's Case," 36 Chicago Bar Rec. 34 (1953).

<sup>13</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 30, § 187.

obviated. Law students especially, and some lawyers also, will be heard to heave a profound sigh of relief over the point. A companion measure amends the statute on entailment,<sup>14</sup> expressly excluding operation of the rule in Shelley's Case from the estate thereby created.<sup>15</sup>

A person holding a right of entry or a possibility of reverter in real estate is now subjected to a new limitation on his power to declare a forfeiture. Such a person must, hereafter, bring his action to recover the land in question within seven years after the time when the condition first became broken and, for this purpose, continuing breaches shall not operate to extend the period.<sup>16</sup> Under another section,<sup>17</sup> the right of action is still deemed to accrue in the person holding the future interest at the time when the breach of condition occurs, but there is nothing in this section to indicate whether or not a new right of action arises with every breach. In view of certain decisions which, either on a theory of waiver<sup>18</sup> or as a result of reading this last mentioned section together with another conferring legal title after seven years' payment of taxes,<sup>19</sup> have barred such future interests,<sup>20</sup> some uncertainty has existed as to the length of time within which a person holding a right of entry or a possibility of reverter might retain his power to declare a forfeiture without exercising it. The amended limitation provides a clear rule, so it may be presumed that the marketability of real estate will thereby be enhanced in those cases where a breach of condition has occurred or there is a question as to such breach.

<sup>14</sup> Laws 1953, p. 1508, H.B. 401; Ill. Rev. Stat. 1953, Vol. 1, Ch. 30, § 5. The section provides that in cases where, by the common law, a person would become seized in fee tail, he shall instead take a life estate, with remainder in fee simple to the persons who, at common law, would first take on the life tenant's death.

<sup>15</sup> The statute would appear to render obsolete the view that the rule in Shelley's Case could operate on the life estate and remainder created under the statute. See Carey & Schuyler, *Illinois Law of Future Interests* (Burdette-Smith Co., Chicago, 1941), p. 165.

<sup>16</sup> Laws 1953, p. 374, S.B. 176; Ill. Rev. Stat. 1953, Vol. 2, Ch. 83, § 1a et seq.

<sup>17</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 83, § 3(4).

<sup>18</sup> See *Sanitary District of Chicago v. Chicago Title & Trust Co.*, 278 Ill. 529, 116 N. E. 161 (1917).

<sup>19</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 83, § 6.

<sup>20</sup> *Storke v. Penn Mutual Life Ins. Co.*, 390 Ill. 619, 61 N. E. (2d) 552 (1945).

The accumulations statute has also been amended. It is now permissible to dispose of real or personal property so as to accumulate income for as long as a life or lives in being and twenty-one years beyond, i. e., for the common-law period of perpetuities, but no longer. Any direction to accumulate in violation of this rule is declared null and void.<sup>21</sup> The new provision applies only to deeds which become legally effective, and to wills of testators dying, on or after the effective date of the amendment. The chief importance of the amendment lies in the fact that it substitutes the common-law rule as to perpetuities for a series of four different periods which prevailed under the former act. These periods, modeled upon the original Thellusson Act,<sup>22</sup> were the source of some uncertainty and their elimination may be regarded as a clear improvement in the law.

Only two cases involving the law of personal property are worthy of any mention. The first case, that of *Doubler v. Doubler*,<sup>23</sup> presented a new construction for the statute relating to the creation of joint bank accounts.<sup>24</sup> Under that statute, a bank in which a joint account has been opened is permitted to pay the funds to a survivor, or survivors, of the parties in whose name the joint account stands provided an agreement to that effect has been signed by all such parties. The instant case presented a question as to whether or not the survivor would be entitled to payment when she had not signed such an agreement, although her husband, at the time of opening the account, had directed the entry of her name in the passbook as a joint tenant. The Supreme Court gave a strict construction to the statutory proviso, held that an agreement signed by both parties was necessary to create a joint tenancy, and denied the survivor any interest in the fund.

The second case simply contained a statement which could be seized upon to raise some doubt as to the right of owners of personal property, holding as tenants in common, to recover such

<sup>21</sup> Laws 1953, p. 112, H.B. 48; Ill. Rev. Stat. 1953, Vol. 1, Ch. 30, § 153.

<sup>22</sup> 39 & 40 Geo. III, c. 98 (1800).

<sup>23</sup> 412 Ill. 597, 107 N. E. (2d) 789 (1952), noted in 2 DePaul L. Rev. 292 and 41 Ill. B. J. 171, reversing 343 Ill. App. 643, 100 N. E. (2d) 761 (1951), abst. opin.

<sup>24</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 76, § 2.



property from a bailee who has possession by virtue of delivery from the owner's agent, acting as bailor. In that case, one entitled *Miller v. First Granite City National Bank*,<sup>25</sup> the plaintiff and a number of other individuals sued, as former members of a union, to recover bonds placed in the defendant's safety deposit box by the officers of the union. The case actually held that the complaint did not sufficiently show that those suing as plaintiffs had the right, either as exclusive owners or as agents for those who were, to remove the bonds. With this decision there can be no quarrel. The opinion does, however, contain the following query: "Upon what basis does membership in a union at a past time (or even currently) give *these* individuals the personal right to demand that the bank pay over to them, individually or *collectively*, funds belonging to the *union* and deposited by it?"<sup>26</sup> If it could be assumed that the plaintiffs were the exclusive owners, and comprised the total membership in the union, an inference to be drawn from the presence of the query would suggest that, as a matter of law, the individuals compromising an unincorporated association should be regarded as distinct from the association itself and, as such, should not be entitled to recover their properties from a bailee, even though, in law, they were the rightful owners. It is clear that such is not the law,<sup>27</sup> so any interpretation of the language of the opinion tending to produce a different result ought to be avoided.

Action by the General Assembly appears to have operated to bring the law of finder's rights up to date. The finder is now encouraged to make an honest effort to find the loser for, under the amended act, if he will appear before a justice of the peace and will advertise the goods as required by statute, he may claim legal title to the lost article if the owner does not appear within the period prescribed by statute,<sup>28</sup> instead of having the same

<sup>25</sup> 349 Ill. App. 347, 110 N. E. (2d) 651 (1953).

<sup>26</sup> 349 Ill. App. 347 at 350, 110 N. E. (2d) 651 at 652. Italics added.

<sup>27</sup> See *Follett v. Edwards*, 30 Ill. App. 386 (1888).

<sup>28</sup> Laws 1953, p. 876, S.B. 103; Ill. Rev. Stat. 1953, Vol. 1, Ch. 50, §§ 16, 24, 28, and 29a. Under the former law, title vested in the finder, in absence of an owner's claim, only in case the goods or money were valued at less than \$15 or, if watercraft, at less than \$5.

go to the county, as was formerly the case. New safeguards for the owner's rights also appear, for the statute now requires that, in addition to making an affidavit describing the goods and saying that he has not altered or changed the appearance thereof, the finder must also swear that he does not know the owner, and that he has not secreted, withheld, or disposed of a portion of the property.<sup>29</sup>

Not only has the statute on joint rights and obligations been amended so as to permit the creation of a joint tenancy in personal property without the use of a straw man<sup>30</sup> but, in addition, the beneficial provisions thereof, designed to protect banks in the payment of funds deposited in a joint account, have now been extended to state and federal savings and loan associations with respect to their certificates of indebtedness or ownership.<sup>31</sup>

#### LANDLORD AND TENANT.

While a lease is generally regarded as a species of contract,<sup>32</sup> it should not be forgotten that it also partakes of the nature of a conveyance of an interest in land,<sup>33</sup> for which reason it must generally be in writing<sup>34</sup> and be delivered to be effective. Failure on the part of the lessee to establish the element of delivery logically produced the decision achieved in the case of *Kleinhaus v. Ohde*<sup>35</sup> where the court held the long-term lease before it was ineffective as a lease and, because insufficiently witnessed, was also inadequate to serve as a testamentary instrument. In much the same way, in the case of *Blumenfeld v. Neuman*,<sup>36</sup> the court applied doctrines relevant to the burden of proof in suits to cor-

<sup>29</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 50, § 36.

<sup>30</sup> Laws 1953, p. 115, S.B. 127; Ill. Rev. Stat. 1953, Vol. 1, Ch. 76, § 2.1.

<sup>31</sup> Laws 1953, p. 371, S.B. 315; Ill. Rev. Stat. 1953, Vol. 1, Ch. 76, § 2(c).

<sup>32</sup> In that regard, note the decision in *Randall v. General Motors Corp.*, 350 Ill. App. 384, 112 N. E. (2d) 915 (1953), discussed above under the topic of Damages, dealing with the question as to whether or not a security deposit provision was one for a penalty or for liquidated damages.

<sup>33</sup> See, for example, Ill. Rev. Stat. 1953, Vol. 1, Ch. 30, § 37, and Ch. 77, § 3.

<sup>34</sup> *Ibid.*, Ch. 59, § 2.

<sup>35</sup> 350 Ill. App. 177, 112 N. E. (2d) 498 (1953). Leave to appeal has been denied.

<sup>36</sup> 350 Ill. App. 306, 112 N. E. (2d) 742 (1953).

rect mistakes in deeds<sup>37</sup> to a case involving a scrivener's mistake in the description set forth in a lease to the demised premises.

Other cases dealt with specific aspects of leasing arrangements. Percentage rent clauses being not uncommon in commercial leases, the decision in the case of *Schoen-McAllister Company v. Oak Park National Bank*<sup>38</sup> should prove to be of general interest for the court there construed the phrase "gross sales," upon which the percentage rent was to be calculated,<sup>39</sup> so as to include therein the amount of the sales tax paid by the customer to the tenant under the terms of the Illinois Retailer's Occupation Tax Act.<sup>40</sup> An effort to prove a mercantile custom to the contrary was rejected on the ground the context of the lease was clear and unambiguous, hence extraneous evidence to vary or augment the terms of the lease was inadmissible. The court noted, however, that it knew of no other case precisely in point.

Options of varying character frequently appear in leases. While an option to purchase the demised premises may be carried over into a renewal term, provided the same is created pursuant to the provisions of the original lease,<sup>41</sup> the case of *Wanous v. Belaco*<sup>42</sup> would indicate that the converse is true where the extension of the term arises by reason of a hold-over tenancy. As the option to purchase is not, in Illinois, regarded as being an independent covenant, it would necessarily expire with the lease in which it appears, for the terms of the hold-over tenancy do not incorporate all the provisions of the lease from which the hold-over tenancy stems but merely carries forward those provisions essential to the new condition of things.<sup>43</sup> The case of *Kleros Building Corporation v. Battaglia*<sup>44</sup> is also worth brief mention for

<sup>37</sup> See, for example, *Tope v. Tope*, 370 Ill. 187, 18 N. E. (2d) 229 (1938).

<sup>38</sup> 349 Ill. App. 500, 111 N. E. (2d) 378 (1953).

<sup>39</sup> The lease defined "gross sales" as being "the total price or charge paid or agreed to be paid on each sale made or service undertaken" at the demised premises.

<sup>40</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 440 et seq.

<sup>41</sup> *Hindu Incense Mfg. Co. v. MacKenzie*, 403 Ill. 390, 86 N. E. (2d) 214 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 323.

<sup>42</sup> 412 Ill. 545, 107 N. E. (2d) 791 (1952), noted in 41 Ill. B. J. 235.

<sup>43</sup> *Weber v. Powers*, 213 Ill. 370, 72 N. E. 1070, 68 L. R. A. 610 (1904).

<sup>44</sup> 348 Ill. App. 445, 109 N. E. (2d) 221 (1952).

it was there held that an option to renew,<sup>45</sup> contained in a lease running to two lessees, could not be exercised by one of them, even though he had succeeded to the interest of his co-tenant, in the absence of consent to the assignment.

Construction of the lease in question was called for, in the case of *Cerny Pickas & Company v. C. R. Jahn Company*,<sup>46</sup> when a lessee contended that the customary surrender provision, under which the lessee is to yield up the premises in good condition with "loss by fire and ordinary wear excepted," operated to absolve the tenant from liability for destruction of the demised premises by reason of a fire brought about through the ignition of installations made therein by the lessee in violation of the municipal building code. A trial court determination that such a provision would excuse the lessee even from the effects of his own fault was reversed when the Appellate Court for the First District concluded that, if the lease had clearly expressed such an intent, which it did not, the terms of the lease would have been opposed to public policy and void. In that connection, the court drew a distinction between leases of commercial and residence property on the one hand and those granted by railroad corporations on the other. In the last mentioned instances, exculpatory clauses have been upheld by reason of the public interest in the operation of the carrier.<sup>47</sup>

The exculpatory clause relied on in the case of *Jackson v. First National Bank of Lake Forest*,<sup>48</sup> however, was held to be valid and enforceable, as well as applicable, despite the claim the same was illegal and void. The landlord there relied on a provision designed to exempt it from liability to the lessee "for any damage or injury to him or his property occasioned by the failure

<sup>45</sup> The case of *Westain v. Phillips Petroleum Co.*, 349 Ill. App. 365, 110 N. E. (2d) 649 (1953), would indicate that a reserved privilege, in favor of the lessor, to cancel a lease on giving notice would not carry over into a renewal thereof, in the event the tenant exercised an option to renew.

<sup>46</sup> 347 Ill. App. 379, 106 N. E. (2d) 828 (1952).

<sup>47</sup> See *Checkley v. Illinois Cent. R. R. Co.*, 257 Ill. 491, 100 N. E. 942, 44 L. R. A. (N. S.) 1127 (1913).

<sup>48</sup> 348 Ill. App. 69, 108 N. E. (2d) 36 (1952). The Supreme Court, on leave to appeal granted, but not in the period of this survey, affirmed the holding: 415 Ill. 453, 114 N. E. (2d) 721 (1953).

of the lessor to keep the premises in repair."<sup>49</sup> Following suit by the lessee for personal injury sustained when a stair-railing affixed to a common stair collapsed because of a latent defect therein, the trial court and the Appellate Court both declared the provision to be controlling and valid since it related to the private affairs of the parties and in no way involved aspects of public concern.<sup>50</sup>

Despite a split of authority elsewhere on the point of the landlord's responsibility for the condition of private walks used as a means of egress and ingress to residential property occupied by multiple tenants, the Appellate Court for the Second District, in the case of *Cronin v. Brownlie*,<sup>51</sup> reached the conclusion that the landlord would not be liable for injuries sustained by a tenant, while walking thereon, produced by a natural accumulation of snow and ice.<sup>52</sup> The court did emphasize the importance, in its holding, of the absence of a covenant on the landlord's part to keep the walks clear of obstruction, together with the fact that the presence of snow and ice was in no way attributable to any other defect in the premises, and that there was evidence tending to disclose contributory negligence on the tenant's part, so a change in any one of these factors might well have led to a different result. There is, however, no split of authority as to the lack of responsibility on the part of a landlord for injury sustained by a tenant's minor child in falling through on open screened window, provided the screen so furnished is of normal character and size, for the Appellate Court for the Fourth District, as evidenced by its decision in the case of *Rogers v. Sins*,<sup>53</sup> agrees with the earlier holding achieved by the First District

<sup>49</sup> See also *Kelly v. City Nat. Bank & Trust Co.*, 348 Ill. App. 419, 109 N. E. (2d) 206 (1952), concerning the operative effect of other language in a clause of similar nature.

<sup>50</sup> In general, see annotation in 175 A. L. R. 8.

<sup>51</sup> 348 Ill. App. 448, 109 N. E. (2d) 352 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 271.

<sup>52</sup> See *Riccitelli v. Sternfeld*, 349 Ill. App. 63, 109 N. E. (2d) 921 (1952), for a discussion of a tenant's liability to third parties for personal injury caused by the piling of snow along a public walk adjacent to the demised premises.

<sup>53</sup> 349 Ill. App. 353, 110 N. E. (2d) 643 (1953).

in the case of *Crawford v. Orner & Shayne, Inc.*<sup>54</sup> An attempt to argue that an open hall window was, to some extent, an attractive nuisance, because the landlord had previously observed the child climbing to the sill thereof and had seen fit to warn the parents of this fact, was rejected when the court declined to extend the attractive nuisance doctrine to the case before it.

The tenant, on the other hand, according to the case of *Phoenix v. Graham*,<sup>55</sup> will not be liable to the landlord for pollution of the water supply in the absence of some showing of neglect by the tenant in the conduct of oil-drilling operations on the demised premises. An attempt to establish a case on the basis that the tenant's conduct amounted to a statutory nuisance<sup>56</sup> was there rejected.

The imminent expiration of federal rent control caused the legislature to adopt an emergency measure with respect to stay of execution in forcible entry and detainer proceedings upon terms which might be regarded as equitable under the circumstances.<sup>57</sup> The statute is, however, shot through with exceptions, so it is fortunate that the life thereof has been limited to two years at the most, by which time conditions in the rental market should have become stabilized if they have not already done so.

#### SECURITY TRANSACTIONS

Little of interest has been decided with respect to issues of law concerning real estate mortgages or rights arising thereunder,<sup>58</sup> but some points have been made with respect to other real

<sup>54</sup> 331 Ill. App. 568, 73 N. E. (2d) 615 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 72-3.

<sup>55</sup> 349 Ill. App. 326, 110 N. E. (2d) 669 (1953), noted in 31 CHICAGO-KENT LAW REVIEW 378.

<sup>56</sup> See Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 466(13).

<sup>57</sup> Laws 1953, p. 53, S.B. 235; Ill. Rev. Stat. 1953, Vol. 1, Ch. 57, § 17.1.

<sup>58</sup> The complicated foreclosure litigation noted in the case of *Illinois Nat. Bank of Springfield v. Gwinn*, 348 Ill. App. 9, 107 N. E. (2d) 764 (1952), in which leave to appeal was denied, represents no more than a logical sequitur to the principles laid down in the earlier decision in the same case reported in 409 Ill. 550, 101 N. E. (2d) 90 (1951). For that matter, the holding in *Benckendorf v. Streater Federal Savings & Loan Ass'n*, 350 Ill. App. 43, 111 N. E. (2d) 572 (1953), recognizing and enforcing an oral agreement to extend the period of redemption from a mortgage foreclosure sale, finds ample support in the decision in *Ogden v. Stevens*, 241 Ill. 556, 89 N. E. 741 (1909), although cases of that character are fairly rare.

estate, or similar, security interests. Priority of lien, as between the holder of a duly recorded real estate mortgage and a mechanic's lien claimant for work done on the encumbered property is a relatively simple matter to resolve.<sup>59</sup> For that matter, the same thing is true with respect to issues regarding priority as between mortgagee and the federal government, in the event the latter should assert a lien for unpaid taxes due it.<sup>60</sup> The problem can, however, according to the decision in *Samms v. Chicago Title & Trust Company*,<sup>61</sup> become quite complicated when the mortgagee, the government, and the mechanic's lien all claim priority in the premises or the improvements placed thereon. In that case, the mortgage appeared of record prior to the time when the government asserted its tax lien, but a later mechanic's lien claimant sought priority over both, at least with respect to the value contributed by his labor and materials. Treating the federal law as being superior to any state doctrine on the subject,<sup>62</sup> and with an eye to the enforcement of tax obligations, the Appellate Court for the First District, finding no exception in the federal statute in favor of later mechanic's claimants,<sup>63</sup> held the federal tax lien to be superior to that of the mechanic, whose mechanic's lien claim the trial court had found to be superior to the mortgage, at least as to the enhanced value. This convoluted order of priority threatened to produce confusion with respect to the distribution of any proceeds of sale, but the court worked out an ingenious scheme in that connection which preserved the mechanic's right so far as it was possible to do so.

One small point concerning the validity of a chattel mort-

<sup>59</sup> See Ill. Rev. Stat. 1953, Vol. 2, Ch. 82, § 16.

<sup>60</sup> 26 U. S. C. A. § 3670.

<sup>61</sup> 349 Ill. App. 413, 111 N. E. (2d) 172 (1953).

<sup>62</sup> Republic National Life Ins. Co. v. Hedstrom, 346 Ill. App. 555, 105 N. E. (2d) 782 (1952).

<sup>63</sup> The opinion does not disclose whether the work was done before or after the filing of the federal tax lien. In view of the attitude taken with respect to the superiority of federal over state law, it would appear to make no difference when the work was done even though the lien, as to other parties, would be perfected despite the fact that notice of lien might not be filed until four months after completion: Ill. Rev. Stat. 1953, Vol. 2, Ch. 82, § 7.

gage<sup>64</sup> was made through the case of *People ex rel. Cohen v. Barrett*.<sup>65</sup> The relator therein sought to compel the issuance, in his favor as purchaser at a sale held pursuant to a judgment against the registered owner,<sup>66</sup> of a clear automobile certificate of title free from notation with respect to an earlier chattel mortgage previously listed thereon running to one of the defendants on the ground such mortgage was defective because improperly acknowledged.<sup>67</sup> The mortgage in question had been acknowledged before a conveniently located public official in Indiana although the mortgagor resided and encumbered property was located in Illinois. It was argued, from the basis of the presence of a statutory form of acknowledgment giving "State of Illinois" as the venue thereof,<sup>68</sup> that the acknowledgment would be valid only if taken within the state. The court, exercising a sound degree of common sense, came to a contrary conclusion and denied mandamus.

For that matter, the validity of other security instruments executed elsewhere than in Illinois also came up for consideration in the federal case of *Freedom National Bank v. Northern Illinois Corporation*<sup>69</sup> where the domestic lender, who had perfected security rights in an automobile trailer under a conditional sales agreement, sought to assert the same to defeat claims made by an earlier foreign lender who had advanced funds on the strength of a Pennsylvania bailment-lease made at a time when the property was physically located in that state. The court rejected the claim that the earlier bailment-lease agreement amounted to a conditional sale in disguise<sup>70</sup> and, on finding the presence of an adequate notation on the certificate of title concerning the same, it treated such legend as constructive, if not

<sup>64</sup> The legislature has extended the filing time, with respect to the validity of chattel mortgages as against third persons, from 10 days to 15 days from date of execution: Laws 1953, p. 1274, H.B. 960; Ill. Rev. Stat. 1953, Vol. 2, Ch. 95, § 4.

<sup>65</sup> 349 Ill. App. 236, 110 N. E. (2d) 452 (1953). Leave to appeal has been denied.

<sup>66</sup> See Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 80(e).

<sup>67</sup> *Ibid.*, Vol. 2, Ch. 95, § 1, requires acknowledgement "as hereinafter directed."

<sup>68</sup> *Ibid.*, Ch. 95, § 2.

<sup>69</sup> 202 F. (2d) 601 (1953).

<sup>70</sup> As to the effect of such an agreement in Pennsylvania, see the case of *General Motors Acceptance Corp. v. Hartman*, 114 Pa. Super. 544, 174 A. 795 (1934).



actual, notice to the subsequent domestic lender who dealt with the chattel after it was brought into Illinois.<sup>71</sup> The rights of the domestic lender were, for these reasons, subordinated to those acquired by the foreign security claimant.

#### TRUSTS

The annual crop of new and startling trust cases was sparse for, while the courts rendered a goodly number of decisions in that field, most of the cases did no more than reiterate well-established principles or, at best, applied such principles to new factual situations. The opinion in *Tucker v. Countryman*<sup>72</sup> could, however, serve to emphasize the need for the careful drafting of testamentary trust instruments in order to avoid later difficulties and uncertainties. In that connection, it would seem to be of particular importance to provide for the disposition of the entire interest of the testator, especially where the testator has expressed an intention to provide for those nearest to him, so a residuary clause should be included as an added safeguard. If not, the whole trust might be declared void for want of certainty, thereby upsetting the testamentary scheme. It might also be suggested that the case of *Staupe v. Heinlein*<sup>73</sup> serves to present an interesting discussion of the circumstances under which a fiduciary relation could be found to be in existence or be lacking. The presence of that relationship may, at times, be a matter of great importance, since the abuse thereof could give rise to a constructive trust.

Three cases did deal with items concerning trust administration. In *Ruddock v. American Medical Association*,<sup>74</sup> the Supreme Court pointed out that the fact that a trustee's sale of trust property would require prior court approval would not render an agreement to sell void, particularly where the agreement

<sup>71</sup> Recognition to foreign security interests on a comity basis has been provided by the decision in *First Nat. Bank of Nevada v. Swegler*, 336 Ill. App. 107, 82 N. E. (2d) 920 (1948).

<sup>72</sup> 414 Ill. 215, 111 N. E. (2d) 101 (1953).

<sup>73</sup> 414 Ill. 11, 110 N. E. (2d) 228 (1953), noted in 41 Ill. B. J. 544.

<sup>74</sup> 415 Ill. 63, 112 N. E. (2d) 107 (1953).

stipulated that the sale was subject to court approval. The case of *United States Trust Company of New York v. Jones*,<sup>75</sup> involving a trust created for the benefit of the settlor's children and their issue with contingent remainder interests granted to other persons, concerned the proper construction to be given to a direction to pay all taxes out of the income arising from trust principal. Specifically, the question was whether a capital gains tax, assessed by reason of the sale of capital assets, should be paid out of income or principal. The Supreme Court adopted the latter view, declaring that the spirit of the trust instrument, rather than the letter thereof, should control. By its reversal of the holding in *Stone v. Baldwin*,<sup>76</sup> the Supreme Court would appear to be relaxing the principle that fiduciaries should exercise the highest degree of good faith and that even the slightest possibility of conflicting interest should serve to disqualify. It there held that an attorney could be appointed to act as a successor-trustee under a testamentary trust even though he had served as attorney for the predecessor trustee, at least in connection with the trustee's final accounting. The fact that the attorney had severed himself from all further service as attorney for the predecessor was said to be sufficient to remove any disqualification.

#### WILLS AND ADMINISTRATION

Only a single wills case possesses enough significance to call for comment and the court there applied the well-known rule that parol evidence of a decedent's declarations are admissible to explain a latent ambiguity in a will, but not for the purpose of explaining a patent one.<sup>77</sup> In *Krog v. Hafka*,<sup>78</sup> involving a

<sup>75</sup> 414 Ill. 265, 111 N. E. (2d) 144 (1953), reversing 346 Ill. App. 365, 105 N. E. (2d) 122 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 194.

<sup>76</sup> 414 Ill. 257, 111 N. E. (2d) 97 (1953), reversing 347 Ill. App. 128, 106 N. E. (2d) 379 (1952). Schaefer, J., wrote a dissenting opinion, concurred in by Hershey, J.

<sup>77</sup> Ordinarily, a latent ambiguity is one which arises out of extrinsic facts, not appearing in the document, which compels a choice between two or more possible meanings, although the language employed suggests but a single meaning. A patent ambiguity, on the other hand, arises merely from the language employed in the will, and may be recognized simply from a reading of it, without looking to the extrinsic facts: *Higginbotham v. Blair*, 308 Ill. 568, 139 N. E. 909 (1923).

<sup>78</sup> 413 Ill. 290, 109 N. E. (2d) 213 (1952), noted in 41 Ill. B. J. 478 and 1953 Ill. L. Forum 147.

will containing a devise to "Harry E. Hafka and his wife Ethel May Hafka," the court held that the fact that Harry had died before the testatrix created a "latent" ambiguity, justifying the admission of parol evidence of declarations of the testatrix to show that she intended a class gift. It would seem that the ambiguity in the case was a patent one, arising solely from the words of the instrument, so that, by classifying it as "latent," the court was straining orthodox definitions in order to consider evidence which it thought pointed to a just result.

Statutory rights of inheritance were concerned in two cases. A new statement with respect to pre-1951 dower law was made by the Supreme Court in *Krile v. Swiney*.<sup>79</sup> In that case, a married woman had died intestate in 1948 owning real estate in fee. She had been survived by certain collateral relatives and by a husband, who died within ten months after letters of administration had been issued on the wife's estate without having taken any action with respect to his dower right in her property. Purchasers claiming under the wife's collateral relatives sought to quiet title against the heirs of the husband, the latter claiming that, since the husband had not perfected dower in the real estate, he had inherited one-half thereof in fee, which interest descended to them. The Supreme Court agreed, holding that, under the statute in force in 1949, waiver of dower was not a condition precedent to the vesting of a fee in the surviving spouse. By so holding, the court virtually overruled the earlier cases of *Braidwood v. Charles* and *Bruce v. McCormick*, both declaring that waiver of dower was a condition precedent.<sup>80</sup> Although the effect of the last mentioned case had been superseded by the 1951 revision of the law relating to dower,<sup>81</sup> it presumably remained, until the instant decision, as authoritative statement of the law existing prior thereto.

<sup>79</sup> 413 Ill. 350, 109 N. E. (2d) 189 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 267, 41 Ill. B. J. 326, and 1953 Ill. L. Forum 147.

<sup>80</sup> See 327 Ill. 500, 159 N. E. 38 (1927), and 396 Ill. 482, 72 N. E. (2d) 333 (1947), respectively. The last mentioned case was noted in 25 CHICAGO-KENT LAW REVIEW 324.

<sup>81</sup> Laws 1951, p. 974; Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 173a.

The second, that of *Spencer v. Burns*,<sup>82</sup> provided interpretation for the descent statute in force during the period from 1939 to 1953<sup>83</sup> by holding that an illegitimate child could inherit only from its mother and from lineal ascendants of the mother, thereby excluding from inheritance an illegitimate half-brother and the descendants of an illegitimate half-sister of the decedent. Some earlier cases had held that an illegitimate person could inherit from collaterals<sup>84</sup> on the basis of a statute which then provided that an illegitimate could inherit from "any person from whom its mother might have inherited, if living."<sup>85</sup> This older provision was dropped at the time of the adoption of the present Probate Act, and the Supreme Court, in the instant case, treated the deletion as being significant, notwithstanding a statutory requirement calling for a liberal construction.<sup>86</sup> A recent decision by the Appellate Court in *Calamia v. Dempsey*<sup>87</sup> was expressly disapproved. The legislature, however, after the Supreme Court decision had been announced, acted to restore the provision thus deleted,<sup>88</sup> so it may be presumed that the older cases again control the situation.

A novel argument regarding an executor's duty to pay certain real estate taxes which had accrued before the testator's death<sup>89</sup> was made in *Kiley v. Newman*.<sup>90</sup> No claim for reimbursement for these taxes was filed against the estate, but the devisees sought to compel the executor to pay the same to prevent the accrual of penalties. The probate court held for the executor but on trial *de novo* in the circuit court judgment ran in favor of the devisees. On further appeal, the executor contended that,

<sup>82</sup> 413 Ill. 240, 108 N. E. (2d) 413 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 268, 2 DePaul L. Rev. 300, and 41 Ill. B. J. 210.

<sup>83</sup> See Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 163.

<sup>84</sup> *Morrow v. Morrow*, 289 Ill. 135, 124 N. E. 386 (1919); *Chambers v. Chambers*, 249 Ill. 126, 94 N. E. 108 (1911).

<sup>85</sup> Laws 1872, p. 352; Ill. Rev. Stat. 1937, Ch. 39, § 2.

<sup>86</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 159.

<sup>87</sup> 344 Ill. App. 503, 101 N. E. (2d) 611 (1951).

<sup>88</sup> Laws 1953, p. 286, H.B. 7; Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 163.

<sup>89</sup> See *In re Estate of Muldoon*, 316 Ill. App. 540, 45 N. E. (2d) 577 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 268, as to the liability of the estate in such a case.

<sup>90</sup> 348 Ill. App. 464, 109 N. E. (2d) 461 (1952).

as no claim for taxes had been filed, allowed, or classified,<sup>91</sup> the probate court was without authority to order payment. The Appellate Court for the First District, affirming the action of the circuit court, held that it was not necessary that a claim for taxes should be either filed or classified before payment could be ordered.<sup>92</sup>

Some outstanding changes have been made by the legislature during the last year.<sup>93</sup> Proof of heirship should be facilitated by an amendment to Section 57 of the Probate Act, one permitting proof by affidavit sworn to before any judge of any court of record in the United States, its territories or possessions, and certified by the clerk thereof, or before any United States consul, or consular agent, or commissioned officer in active service within or without the United States.<sup>94</sup> A petition to probate a will creating a testamentary trust need no longer include the names and addresses of beneficiaries who are not heirs, for a recent amendment provides that it is sufficient simply to give the name and address of the trustee.<sup>95</sup> A new section purports to validate orders admitting wills to probate, entered prior to the effective date of the new statute, provided notice had been given to heirs of the decedent, even though other interested parties, normally entitled to notice, had not been furnished with notice.<sup>96</sup> A newly added section<sup>97</sup> declares that the Department of Public Welfare may, with court approval, designate one of its employees to serve, without compensation, as conservator of the personal estate of a patient in a state mental hospital, provided the estate does not exceed \$1,000. In other cases, no guardian or conservator is needed where the personal estate of the minor or incompetent is

<sup>91</sup> See Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 344 et seq., particularly §§ 354 and 356.

<sup>92</sup> While the court could cite no Illinois decision in support of its ruling, it did rely on 21 Am. Jur., Executors and Administrators, § 351, where the principle was stated as being the rule in several other jurisdictions.

<sup>93</sup> See above, this section, at note 88, with respect to the right of illegitimate persons to inherit by descent. See also the section on Family Law, particularly notes 44 to 46, for reference to legislative changes concerning rights of inheritance between adopted children and adopting parents.

<sup>94</sup> Laws 1953, p. 69, S.B. 76; Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 209.

<sup>95</sup> Laws 1953, p. 234, S.B. 128; Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, §§ 215-6.

<sup>96</sup> Laws 1953, p. 235, S.B. 267; Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 216a.

<sup>97</sup> Laws 1953, p. 967, H.B. 864; Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 270b.

\$1,000 or less.<sup>98</sup> Heretofore, the maximum figure had been fixed at \$500.<sup>99</sup>

Proceedings under the Probate Act were, until recently, governed by the terms of the Civil Practice Act except as to matters concerning the sale or mortgage of a ward's or decedent's real estate,<sup>1</sup> which matters were declared exempted from the operation of Section 50(8) of the Civil Practice Act.<sup>2</sup> A similar exemption has now been made with respect to a sale or a mortgage of real estate by nonresident fiduciaries.<sup>3</sup> It could also be noted that a redefinition of the terms "executor, administrator, administrator to collect, guardian, and conservator," as used in the Probate Act, has occurred with the result that foreign corporations, banks, and national banking associations authorized to act in a fiduciary capacity, may now serve in any of the designated capacities.<sup>4</sup>

## VII. PUBLIC LAW

### ADMINISTRATIVE LAW

Administrative law cases of significance appear to be equally divided between those dealing with problems of administrative procedure and those concerning judicial review of administrative decisions. In the former category, three decisions appear to be worthy of comment. The case of *Illinois Bell Telephone Company v. Illinois Commerce Commission*<sup>1</sup> required a clear-cut determination of an issue which the court had previously passed upon only inferentially. The telephone company there concerned had filed schedules with the commission calling for an increase in rates. At the close of the hearings, the City of Chicago moved that the

<sup>98</sup> Laws 1953, p. 184, S.B. 50; Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, §§ 479-80.

<sup>99</sup> See Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 480.

<sup>1</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 155.

<sup>2</sup> Ibid., Ch. 110, § 174(8). The provision in question permits a defendant without notice, over whom jurisdiction has been acquired by publication, to petition to set aside a final decree within one year from the date of its entry.

<sup>3</sup> Laws 1953, p. 836, S.B. 80; Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 155.

<sup>4</sup> Laws 1953, p. 1060, H.B. 884; Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 152.

<sup>1</sup> 414 Ill. 275, 111 N. E. (2d) 329 (1953), noted in 31 CHICAGO-KENT LAW REVIEW 374.

commission should disregard the evidence and cancel the schedules upon the theory that two years had not elapsed since the last order had been entered regarding rates,<sup>2</sup> but the commission refused so to do. It was argued, on appeal, that the statutory provision in question established a minimum time period which had to elapse before the commission could entertain another request for an alteration of rates. The Supreme Court, however, held that the statute was not intended to create an absolute two-year period of repose, relying upon the interpretation which had been given to the statute by the commission over a period of many years. The court noted that alteration of rates depends primarily upon changing economic conditions, which changes are often unpredictable, so it would be unfair to place a time restriction on the availability of a remedy intended to provide relief from such occurrences.

The plaintiff involved in the case of *Smith v. Department of Registration and Education*<sup>3</sup> was a doctor authorized to practice medicine within the state against whom proceedings had been instituted for the revocation of his license on the ground that, as an advocate of the Koch treatment of cancer, he had been guilty of making false claims concerning his skill in the treatment of that particular malady. A medical committee, appointed to conduct hearings, made certain findings based on the evidence presented and recommended revocation, which recommendation was adopted. On complaint under the Administrative Review Act, the Department's order was affirmed by the trial court but, on appeal to the Supreme Court, the order was reversed and remanded with directions. It appeared that the plaintiff had made two requests prior to the hearing, to-wit: (1) that a *dedimus potestatem* should issue to procure a prehearing deposition from the non-resident complaining witness, and (2) that the medical committee so appointed should be declared disqualified for bias and prejudice.<sup>4</sup> It was

<sup>2</sup> The city relied on Ill. Rev. Stat. 1953, Vol. 2, Ch. 111½, § 71.

<sup>3</sup> 412 Ill. 332, 106 N. E. (2d) 722 (1952).

<sup>4</sup> In support of this point, it was alleged that the entire committee was made up of members and officers of the American Medical Association which association had gone on record as denouncing the Koch treatment and characterizing the plaintiff as the "Number 1 quack of Chicago." It was alleged that there were thousands of doctors in the area, not identified with the association, who could be recruited to form an unbiased committee.

contended that the denial of these requests violated constitutional rights since, under almost identical circumstances, the Department and the medical committee had granted requests of this nature in other matters. The court, while not passing upon the validity of this exact argument, stated that, as the accusation of prejudice had not been denied, and facilities for the appointment of a different committee were present, the request for change of venue should have been granted.<sup>5</sup>

It was also argued that the evidence relied upon by the committee to support some of its findings was insufficient, particularly with respect to the therapeutic value of the Koch treatment. No evidence was presented on this phase of the problem for the committee appears to have drawn on its own knowledge and professional skill in determining the point. In that connection, the Supreme Court felt that facts known to an administrative agency, but not established by evidence presented at a hearing, could not be utilized to support an order. The conclusion would appear to be sound for, while an administrative body made up of experts might possess a great deal of knowledge and skill in the particular field, they should not be allowed to use the same to fill gaps in the evidence, otherwise parties affected by the decision would have no opportunity to know the evidence presented and would, therefore, be in no position to refute the same. The expertness of an administrative tribunal should be utilized to understand and weigh the evidence, not to supply it.

The consequence of a failure to take advantage of available administrative procedure is well illustrated by the case of *Colton v. Commonwealth Edison Company*.<sup>6</sup> The plaintiff there concerned received service from the defendant under a special rate. The defendant, wishing to cancel such rate as of a specific date, filed a revision of the rate with the Commerce Commission. That body issued no order but merely made an entry in its minutes indicating

<sup>5</sup> The fact that it was possible to appoint a new medical committee ruled out any application of the "doctrine of necessity," which doctrine provides that, where there is only one available tribunal in existence for the administration of a statute, it cannot be disqualified, even though bias and prejudice exists, since otherwise the law would go unadministered.

<sup>6</sup> 349 Ill. App. 490, 111 N. E. (2d) 363 (1953). Leave to appeal has been denied.



that it would take no action with respect to the rate. Several days before the rate was to be cancelled, the plaintiff, in accordance with the provisions of the Public Utility Act,<sup>7</sup> filed a complaint with the commission but later abandoned the same before a hearing was held and, instead, began an action before a court to enjoin the cancellation of the rate in issue. This suit was dismissed for lack of jurisdiction, because of the failure to exhaust the administrative remedy. While not novel, the case provides a restatement of the well-accepted rule that a party must exhaust the administrative remedy before seeking relief before another forum.<sup>8</sup>

So far as the Illinois Administrative Review Act<sup>9</sup> is concerned, the courts of the state, in the past year, have merely applied well-recognized rules to several cases. For instance, in *Ross v. Chicago Land Clearance Commission*,<sup>10</sup> the Supreme Court held that there was no right to review under the act from a decision of the State Housing Board since the statute creating that agency did not include an adoption of the provisions of the former.<sup>11</sup> It also became necessary for the reviewing tribunal to remind trial courts that, at the time of reviewing decisions by administrative tribunals, they are limited by a lack of power to hear additional evidence, for the trial court is to do no more than scan the record compiled at the administrative hearing, which record, if inadequate, must be remanded to the board for supplementation. It might also be noted that the Administrative Review Act has been amended by the addition of a provision requiring the trial court, when entertaining an appeal, to give effect to any bond requirement contained in the statute creating the tribunal whose order is about to be reviewed,<sup>12</sup> and a number of subsidiary statutes establishing administrative agencies have been amended to call for

<sup>7</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 111½, § 36.

<sup>8</sup> The decision in *Halpin v. Scotti*, 415 Ill. 104, 112 N. E. (2d) 91 (1953), dealing with the right to grant immunity from prosecution in return for information divulged, is noted above. See Criminal Law and Procedure, notes 35-7. The value of the case in the field of administrative law is inestimable for, without information, the administrative body would frequently be unable to perform its functions.

<sup>9</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 264 et seq.

<sup>10</sup> 413 Ill. 377, 108 N. E. (2d) 776 (1952).

<sup>11</sup> See Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 265.

<sup>12</sup> Laws 1953, p. 1597, H.B. 710; Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 275(i).

review of the decisions and order thereof in accordance with the terms of the Review Act.<sup>13</sup>

#### CONSTITUTIONAL LAW

Although nothing of significance occurred in relation to conflict of laws,<sup>14</sup> the judicial year witnessed some nineteen attacks on Illinois statutes for a variety of constitutional reasons, ranging from claimed violations of the revenue article to special legislation because of improper classification, but these attacks were sustained in only four instances.

One case, that of *Antle v. Tuchbreiter*,<sup>15</sup> stands out above all others, not so much for the specific holding therein, which can be sustained on other grounds, but because of its possible, or even probable, future effect in the field of constitutional law. In that case, the constitutionality of the Social Security Enabling Act<sup>16</sup> was unsuccessfully challenged for the court answered, and overruled, each contention by applying recognized principles of state constitutional law. The concluding paragraph of the opinion therein is particularly important. The court there stated that compliance with the terms of the Federal Social Security Act constituted a contract between the state and the federal governments with the authority to make such contract being derived from the supremacy clause of the federal constitution. It having been decided, in *Dyer v. Sims*,<sup>17</sup> that a state could not assert the provisions of its own constitution to invalidate a contract made with another state, it was not difficult to conclude that the state government could not deny this particular contract by virtue of

<sup>13</sup> The statutes affected appear in Ill. Rev. Stat. 1953, under the designation of Ch. 23, § 437-2.17; Ch. 24, § 7-4; Ch. 24, § 950; Ch. 56½, § 269; Ch. 95½, § 73.11; Ch. 111½, § 183; Ch. 120, § 453.72; Ch. 122, §§ 8-9; and Ch. 122, § 34-113.1.

<sup>14</sup> The case of *People ex rel. Cohen v. Barrett*, 349 Ill. App. 236, 110 N. E. (2d) 452 (1953), in which leave to appeal has been denied, dealing with an issue as to the validity of a chattel mortgage executed and acknowledged in a foreign state, is discussed above under Property, sub-topic Security Transactions, particularly notes 65-8.

<sup>15</sup> 414 Ill. 571, 111 N. E. (2d) 836 (1953).

<sup>16</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 127, § 254b.1 et seq., provides for the bringing of state employees under the federal statute, consonant with the provisions of 42 U. S. C. A. § 418.

<sup>17</sup> 341 U. S. 22, 71 S. Ct. 557, 95 L. Ed. 713 (1951).

anything in the Illinois constitution. In that connection, the court appears to have announced principles of state constitutional law essentially similar to the doctrine propounded in the case of *Missouri v. Holland*.<sup>18</sup> In view of the increasing tendency on the part of the federal government to enlist state co-operation in the carrying on of various projects, it would appear that the last word on the subject has not yet been spoken.

The revenue article<sup>19</sup> formed the foundation for attacks challenging the validity of two taxing statutes. In *Mutual Tobacco Company v. Halpin*,<sup>20</sup> the Cigarette Tax Act<sup>21</sup> was challenged on the ground that it was not uniform in that it was a flat tax per cigarette without regard to the selling price, thereby causing the tax rate to vary percentage-wise in relation to the selling price. Upholding the statute, the Supreme Court indicated that absolute equality of taxation, being at times impracticable, was not required by law. In the other case, that of *Johnson v. Halpin*,<sup>22</sup> the companion Cigarette Use Tax Act<sup>23</sup> was unsuccessfully attacked on the ground that it was a tax upon a right, hence not authorized by the revenue article,<sup>24</sup> but the court held the use of cigarettes to be no more than a privilege. Privileges, the court noted, are not restricted to those things which may be done only with legislative sanction, for many things heretofore regarded as being matters of right may now be made the subject of taxation on the basis of being privileges.<sup>25</sup> Relying on the holding in *Nelson v. Sears, Roebuck & Company*,<sup>26</sup> the court turned aside another attack based on a claim of unconstitutional interference with interstate commerce.

<sup>18</sup> 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984 (1920).

<sup>19</sup> Ill. Const. 1870, Art. IX, §§ 1-2.

<sup>20</sup> 414 Ill. 226, 111 N. E. (2d) 155 (1953).

<sup>21</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 453.1 et seq.

<sup>22</sup> 413 Ill. 257, 108 N. E. (2d) 429 (1952), noted in 41 Ill. B. J. 279, cert. den. 345 U. S. 923, 73 S. Ct. 781, 97 L. Ed. 668 (1953).

<sup>23</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 453.31 et seq.

<sup>24</sup> See *Bachrach v. Nelson*, 349 Ill. 579, 182 N. E. 902 (1932), for a discussion of the scope of the taxing power.

<sup>25</sup> The case of *Harder's Storage Co. v. City of Chicago*, 235 Ill. 58, 85 N. E. 253 (1908), was relied upon. Actually, that case involved the "privilege" of using public property, to-wit: city streets.

<sup>26</sup> 312 U. S. 359, 61 S. Ct. 586, 85 L. Ed. 888 (1941).

Two cases arose calling for an interpretation of the phrases "public purpose" and "corporate purpose." In *People v. City of Chicago*,<sup>27</sup> the validity of the tax provision of the Illinois Civil Defense Act<sup>28</sup> was questioned on the ground the tax was not one for a corporate purpose. The court treated the measure as valid inasmuch as it was regarded to be a proper exercise of the police power for the city to make advance preparation for the health, welfare and safety of the public.<sup>29</sup> In the second case, that of *People ex rel. Gutknecht v. City of Chicago*,<sup>30</sup> the 1949 amendment<sup>31</sup> to the Blighted Areas Redevelopment Act<sup>32</sup> was attacked for a number of reasons, but principally because it was said to involve the taking of private property for other than a public purpose.<sup>33</sup> An attempt was made to distinguish the problem from the one concerned in the case of *Chicago Land Clearance Commission v. White*<sup>34</sup> on the ground the amendment applied to vacant land. The statute was sustained since the court felt that even vacant land could be blighted and slum clearance was a "public" purpose, with the part being played by private interests serving merely as a means to that end.

Three cases dealt with aspects of due process of law and, in all of them, the specific objection raised was that the statutory provisions concerned were too indefinite and vague. In *People ex rel. Montgomery v. Lierman*,<sup>35</sup> the section of the Revised Cities and Villages Act relating to the union of contiguous communities<sup>36</sup>

<sup>27</sup> 413 Ill. 83, 108 N. E. (2d) 16 (1952), noted in 41 Ill. B. J. 232.

<sup>28</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 127, § 281.

<sup>29</sup> The statute was also held not to violate U. S. Const., Art. I, §§ 8-10, since, by its terms, the purpose was evidently one to carry out functions other than those for which the military forces would be primarily responsible.

<sup>30</sup> 414 Ill. 600, 111 N. E. (2d) 626 (1953), noted in 101 U. of Pa. L. Rev. 1246. Crampton, J., wrote a dissenting opinion.

<sup>31</sup> Laws 1949, p. 997. The amended provision appears in Ill. Rev. Stat. 1953, Vol. 1, Ch. 67½, § 64.

<sup>32</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 67½, § 63 et seq. The general validity thereof was tested in *People ex rel. Touhy v. City of Chicago*, 399 Ill. 551, 78 N. E. (2d) 285 (1948), and *Chicago Land Clearance Commission v. White*, 411 Ill. 310, 104 N. E. (2d) 236 (1952).

<sup>33</sup> Ill. Const. 1870, Art. II, § 13.

<sup>34</sup> 411 Ill. 310, 104 N. E. (2d) 236 (1952).

<sup>35</sup> 415 Ill. 32, 112 N. E. (2d) 149 (1953).

<sup>36</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 24, § 6—1 et seq.

was challenged, but the court, after a detailed review of the provisions of the statute, thought there was no ambiguity present. In *Jaffe v. Cruttenden*,<sup>37</sup> the attack was directed toward some provisions of the Illinois Securities Law designed to exempt certain sales from the operation thereof<sup>38</sup> with particular criticism being directed to the phrases "reasonably related to the current market" and "recognized manual." These terms were said to be sufficiently definite when measured by the common understanding and practice in the field. The third case, that of *People v. Adduci*,<sup>39</sup> concerned the law prohibiting state officers from becoming interested in state contracts.<sup>40</sup> It was said that the words "become directly or indirectly interested," as used therein, were adequate to apprise as to the nature of the prohibited contracts.

The section of the School Code operating to restore pension payments previously taken away from retired public school teachers<sup>41</sup> was again brought under fire in the case of *Voigt v. Board of Education of the City of Chicago*,<sup>42</sup> but it was again sustained on the authority of an earlier case<sup>43</sup> wherein the theory had been expressed that the state was under a moral obligation to restore the pension, hence the payments were not considered to be prohibited extra compensation for past services.<sup>44</sup>

Improper classification served as the primary ground for the claimed unconstitutionality urged in three cases, in two of which the contention was successful. The case of *Ronda Realty Corporation v. Lawton*<sup>45</sup> dealt with a Chicago ordinance requiring apartment buildings to furnish parking facilities on the premises<sup>46</sup> which was held unconstitutional because the classification was said

<sup>37</sup> 412 Ill. 606, 107 N. E. (2d) 715 (1952).

<sup>38</sup> Ill. Rev. Stat. 1951, Vol. 2, Ch. 121½, § 100(7). The statute has now been replaced by Ill. Rev. Stat. 1953, Vol. 2, Ch. 121½, § 137.1 et seq.

<sup>39</sup> 412 Ill. 621, 108 N. E. (2d) 1 (1952).

<sup>40</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 127, § 75.

<sup>41</sup> *Ibid.*, Ch. 122, § 34—90.

<sup>42</sup> 413 Ill. 233, 108 N. E. (2d) 426 (1952). Bristow, J., dissented.

<sup>43</sup> See *Krebs v. Board of Education*, 410 Ill. 435, 102 N. E. (2d) 321 (1951).

<sup>44</sup> Ill. Const. 1870, Art. IV, § 19.

<sup>45</sup> 414 Ill. 313, 111 N. E. (2d) 310 (1953).

<sup>46</sup> Mun. Code Chicago 1931, Ch. 194A, § 8(2).

to be both arbitrary and discriminatory in that boarding houses, rooming houses, hotels, and the like were not essentially different from apartment buildings insofar as the parking problem was concerned. In *Larvenette v. Elliott*,<sup>47</sup> certain amendments to the Election Code<sup>48</sup> were stricken down. These sections purported to direct that circulators of petitions for candidates for state offices could not solicit outside of the county in which the circulators resided but that those concerned with petitions for lesser offices might solicit anywhere in the corresponding district. Although the court agreed that the purpose of the statute was to minimize the possibility of fraudulent signatures, it felt there was no essential difference between state and other offices in this respect. The charge of improper classification levelled at a city ordinance regulating the slaughter of poultry by retail live poultry dealers<sup>49</sup> was, however, in the case of *Charles v. City of Chicago*,<sup>50</sup> rejected when the court expressed the belief that the classification scheme was a reasonable one.

Two statutes were challenged on the theory they involved improper delegations of legislative power. A section of the Cities and Villages Act<sup>51</sup> was held invalid in *People ex rel. Chicago Dryer Company v. City of Chicago*<sup>52</sup> for the reason that, by requiring a city council to change the name of a street when so petitioned by a stated percentage of the property owners abutting thereon, an improper delegation to private persons had been purportedly authorized. In *Department of Public Works and Buildings v. Lanter*,<sup>53</sup> however, the attack on the Freeways Act<sup>54</sup> failed when the court expressed satisfaction with the standards there involved.

Three other cases possess some general interest. An unsuc-

<sup>47</sup> 412 Ill. 523, 107 N. E. (2d) 743 (1952).

<sup>48</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 46, §§ 156g-h.

<sup>49</sup> Mun. Code Chicago 1931, Ch. 95, §29.1.

<sup>50</sup> 413 Ill. 428, 109 N. E. (2d) 790 (1953), noted in 1953 Ill. L. Forum 140, cert. den. 345 U. S. 974, 73 S. Ct. 1122, 97 L. Ed. 957 (1953).

<sup>51</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 24, § 23—26.

<sup>52</sup> 413 Ill. 315, 109 N. E. (2d) 201 (1952).

<sup>53</sup> 413 Ill. 581, 110 N. E. (2d) 179 (1953).

<sup>54</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 121, §§ 334-43.

cessful attack was made, in *Kough v. Hoehler*,<sup>55</sup> on certain sections of the Mental Health Code.<sup>56</sup> The charges there authorized to be made against patients in mental institutions, or their relatives, were said not to be a form of taxation, hence did not have to comply with the revenue article.<sup>57</sup> In *Gadlin v. Auditor of Public Accounts*<sup>58</sup> an attack on the Currency Exchange Act<sup>59</sup> failed to produce results. The case possesses interest because, under the holding therein, currency exchanges may be classed with other businesses subject to prohibition in the absence of an affirmative showing of public convenience and necessity. The Cemetery Care Act,<sup>60</sup> placed under fire in the case of *Union Cemetery Association v. Cooper*<sup>61</sup> for a whole host of reasons, also survived the challenge directed against it.

Certain Illinois statutory regulations were charged with being violative of the federal constitution. The case of *Berger v. Barrett*<sup>62</sup> concerned a provision of the Motor Vehicle Act which required the payment of an investigation fee in order to secure an Illinois certificate of title to an automobile not previously registered in this state nor purchased from an Illinois dealer.<sup>63</sup> The statute was said to discriminate against interstate commerce. On the other hand, in *City of Chicago v. Willett Company*,<sup>64</sup> a city ordinance imposing a license tax on trucks travelling over the city streets was held constitutional despite the claim made therein that interstate commerce was being unduly burdened.

It would also be proper to note that, during the period of this survey, two proposed amendments to the state constitution received the approval of the electorate and were proclaimed

<sup>55</sup> 413 Ill. 409, 109 N. E. (2d) 177 (1952), noted in 41 Ill. B. J. 330.

<sup>56</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 91½, §§ 9—19 to 9—25.

<sup>57</sup> Ill. Const. 1870, Art. IX, § 1.

<sup>58</sup> 414 Ill. 89, 110 N. E. (2d) 234 (1953), criticized in 41 Ill. B. J. 599.

<sup>59</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 16½, § 30 et seq.

<sup>60</sup> Ibid., Ch. 21, § 24.1 et seq.

<sup>61</sup> 414 Ill. 23, 110 N. E. (2d) 239 (1953).

<sup>62</sup> 414 Ill. 43, 110 N. E. (2d) 218 (1953).

<sup>63</sup> Ill. Rev. Stat. 1951, Vol. 2, Ch. 95½, § 77.

<sup>64</sup> 344 U. S. 574, 73 S. Ct. 460, 97 L. Ed. 333 (1953), noted in 31 CHICAGO-KENT LAW REVIEW 353, reversing 406 Ill. 286, 94 N. E. (2d) 195 (1950), as clarified in 409 Ill. 480, 101 N. E. (2d) 205 (1951). Douglas, J., wrote a dissenting opinion.

adopted. One provision was designed to eliminate the double liability which previously attached to holdings of stock in state banks.<sup>65</sup> The other, intended to remove a constitutional restriction on the maximum compensation payable to county officers, is still subject to the limitations there expressed and such other regulations as the general assembly may lawfully impose.<sup>66</sup>

#### MUNICIPAL CORPORATIONS

An Appellate Court holding in the case of *Thomas v. Broadlands Community Consolidated School District*<sup>67</sup> outlines a theory of considerable importance with respect to the tort liability of school districts and the like but, as the specific point has not yet reached the Illinois Supreme Court, it is impossible to prophesy as to the depth of change made by the decision. The case was one in which a school district was sued by a child injured while playing in the school yard. The plaintiff's reference to the case of *Moore v. Moyle*<sup>68</sup> as being decisive, at least by analogy, could hardly be conceded in substance, for a charity rather than a public school was there involved. Nevertheless, the court held that, where liability insurance is available to protect public funds, the reason for the rule of immunity heretofore enjoyed by school districts will vanish to the extent of the available insurance, leading to something in the nature of a "waiver of immunity." A considerable departure from historic policy in Illinois appears to be shaping up.

Civil service and related issues were involved in two cases. One of them, the case of *People ex rel. Donahoo v. Board of Education*,<sup>69</sup> called for statutory construction of that portion of the School Code which directs that, where a teacher has been employed for a probationary period of two consecutive school terms, such teacher "shall enter upon contractual continued serv-

<sup>65</sup> Ill. Const. 1870, Art. XI, § 6, as amended November 24, 1952.

<sup>66</sup> *Ibid.*, Art. X, § 10.

<sup>67</sup> 348 Ill. App. 567, 109 N. E. (2d) 636 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 279 and 1953 Ill. L. Forum 162.

<sup>68</sup> 405 Ill. 555, 92 N. E. (2d) 81 (1950).

<sup>69</sup> 413 Ill. 422, 109 N. E. (2d) 787 (1953), reversing 346 Ill. App. 241, 104 N. E. (2d) 833 (1952).



ice unless given written notice of dismissal stating the specific reason therefor."<sup>70</sup> The teacher there concerned had completed his probationary period but had been notified that his contract would not be renewed, which notice of dismissal or non-renewal gave no reason for the action. The Supreme Court, hearing the matter on denial of a writ of mandamus, held the statutory provision was mandatory in character.

In the second case, that of *Young v. Chicago Housing Authority*,<sup>71</sup> the question presented was one as to the right of the authority to take the fingerprints of all of its employees. One employee, on behalf of himself and his fellows, objected to this procedure stating that it was the ultimate disposition, rather than the actual taking, of the fingerprints which was obnoxious and not within the authority of the public corporation. After taking, the fingerprints were to be forwarded to the state Bureau of Identification and the federal Bureau of Investigation. A return of confidential data would be made to the state police and thereafter be released to the employer. Considering the social implications involved, the Appellate Court expressed the belief that this procedure could result in providing protection to the persons and the property of tenants of the housing authority. Such being the case, the program was classed as being reasonable and within the discretionary powers granted. The opinion, of course, is without precedent or analogy in this state.

Not wholly irrelevant to this topic, but more properly noted under the heading of constitutional law, are some cases dealing with aspects of municipal authority. In *People ex rel. Gutknecht v. City of Chicago*,<sup>72</sup> an attack on certain amendatory provisions of the Blighted Areas Redevelopment Act<sup>73</sup> failed. There can be no question but that social policy, bottomed upon judicial knowledge of contemporary conditions, was persuasive. In *People v.*

<sup>70</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 122, § 24(2).

<sup>71</sup> 350 Ill. App. 287, 112 N. E. (2d) 719 (1953).

<sup>72</sup> 414 Ill. 600, 111 N. E. (2d) 626 (1953), noted in 101 U. of Pa. L. Rev. 1246. Crampton, J., wrote a dissenting opinion.

<sup>73</sup> Laws 1949, p. 997; Ill. Rev. Stat. 1953, Vol. 1, Ch. 67½, § 64.

*City of Chicago*,<sup>74</sup> the municipality was held to be constitutionally entitled to incur expense for, and to levy a tax on behalf of, the adoption of civil defense measures, said to be in the interest of the safety and welfare of the public. The case of *Ronda Realty Corporation v. Lawton*,<sup>75</sup> however, would indicate that a city could not require apartment buildings to provide adequate parking facilities on the premises without imposing a similar requirement on hotels, boarding houses, rooming houses, and the like. It was also held, in *Deer Park Civic Association v. City of Chicago*,<sup>76</sup> that once a building permit has been issued and construction begun, the city may not, by an amendatory zoning ordinance, change the use to which the property may be put.

One further case might be mentioned because of the extensive review of earlier cases provided by the opinion therein and also because of the size of the potential damage claim. The facts in the case of *Wacker-Wabash Corporation v. City of Chicago*<sup>77</sup> indicate that certain condemnation proceedings were begun which would have resulted in the opening of a short street off the gigantic Wacker Drive improvement in downtown Chicago. The building corporation, in anticipation of the opening of this street, constructed a huge building, including a large garage, with a planned entrance consistent with the proposed street improvement.<sup>78</sup> Ten years later, the condemnation proceedings were abandoned and this action for damages followed, with plaintiff asserting a claim resting upon its reliance on the overall street plan, induced by promises and representations on the part of certain of the city officials, leaving the corporation with a building unavailable for the planned use at the ground and street levels. The Appellate Court ruled that the statements allegedly made by the municipal officials established no contractual rights, either expressed or im-

<sup>74</sup> 413 Ill. 83, 108 N. E. (2d) 16 (1952), noted in 41 Ill. B. J. 232.

<sup>75</sup> 414 Ill. 313, 111 N. E. (2d) 310 (1953).

<sup>76</sup> 347 Ill. App. 346, 106 N. E. (2d) 823 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 192 and 2 DePaul L. Rev. 303.

<sup>77</sup> 350 Ill. App. 343, 112 N. E. (2d) 903 (1953).

<sup>78</sup> There was little question but that the plaintiff had shaped its building to conform with the overall city plan, for it appeared that a building permit would not have been issued if the plaintiff had not done so.

plied, between the plaintiff and the city in the absence of a council resolution, so the action for damages was defeated at the threshold and plaintiff's invocation of estoppel was rejected.

#### PUBLIC UTILITIES

Mention has been made of one aspect<sup>79</sup> of the case entitled *Illinois Bell Telephone Company v. Illinois Commerce Commission*.<sup>80</sup> Another question therein concerned the method adopted by the Public Utility Commission in determining the value of the company's property for the purpose of establishing the rate base. In that connection, the commission seemed to have stressed a certain factor obtained by comparing the stock market quotations of the utility company's stock with the admitted book value thereof. Accepting the original cost of the property to the company and then applying this factor, the commission arrived at a valuation figure called a "judgment estimate." It was told that it had erred in relying on this "interest plus dividends" formula as an exclusive guide to rate-making, and it was cautioned, at least inferentially, that it should take into account such matters as current economic conditions, present price levels, and reproduction costs. The case, therefore, may be said to possess significance as indicative of a potential change in the composition of the rate-making formula.

There is also some indication, by virtue of the holding of the United States Supreme Court in the case of *City of Chicago v. Willett Company*,<sup>81</sup> that the "home port" theory may be opening up to permit licensing by municipalities of interstate cartage companies where the interstate and local business operations are inseparable. A claim advanced there that such regulation would result in a forbidden obstruction upon interstate commerce was rejected by a divided court.

<sup>79</sup> See above, this section, notes 1 and 2, for a discussion of an administrative law issue contained in the case.

<sup>80</sup> 414 Ill. 275, 111 N. E. (2d) 329 (1953).

<sup>81</sup> 344 U. S. 574, 73 S. Ct. 460, 97 L. Ed. 333 (1953), noted in 31 CHICAGO-KENT LAW REVIEW 353, reversing 406 Ill. 286, 94 N. E. (2d) 195 (1950), as clarified in 409 Ill. 480, 101 N. E. (2d) 205 (1951). Douglas, J., wrote a dissenting opinion.

## TAXATION

During the past few years, problems of taxation in connection with divorce, both in the federal sphere as to gift and estate taxes, and in the realm of state inheritance taxes, have been subjected to re-examination. Possibly under the impetus of the liberalizing of income tax treatment,<sup>82</sup> or because of the influence of the public sentiment, there has been a marked tendency to change the rules with regard to federal gift taxation.<sup>83</sup> The Illinois Supreme Court has now, through its decision in the case of *In re Estate of Greiner*,<sup>84</sup> also evidenced a degree of liberalization in state matters. The case involved an appeal from an inheritance tax assessment taken by an executor of a testator whose wife had divorced him many years before under a decree which recited and approved a property settlement. Contemporaneously therewith, the husband executed a will leaving a substantial sum in cash to the wife who was divorcing him, with the provision that this sum was to be in lieu of dower rights but that, if the bequest should be altered, the wife would be "entitled to all her property rights, including the right of dower" provided she survived the husband and had not remarried. The executor contended that this sum was taken by the wife, at the testator's death, as a creditor and not as a legatee. The Supreme Court agreed, without indicating too clearly whether, in its opinion, the right of the creditor arose out of the settlement contract or out of the decree.<sup>85</sup>

This treatment of the point can hardly be said to be definitive, and is rendered less so by the circumstance that the court sup-

<sup>82</sup> See I.R.C. § 23(u), allowing the husband to deduct alimony payments, and I. R. C. § 22(k), requiring the divorced wife to include such payments in her return.

<sup>83</sup> *Harris v. Commissioner*, 340 U. S. 106, 71 S. Ct. 181, 95 L. Ed. 111 (1950).

<sup>84</sup> 412 Ill. 591, 107 N. E. (2d) 836 (1952), noted in 1953 Ill. L. Forum 162.

<sup>85</sup> It is clear that an interest taken at death by way of dower, or in lieu of dower, is subject to inheritance tax: *Billings v. People*, 189 Ill. 472, 59 N. E. 798 (1901); *Mayer v. Reinecke*, 130 F. (2d) 350 (1942). The Supreme Court apparently assumed that the surviving ex-wife had a claim against the decedent's estate for the amount in question, but this could hardly be the case. If the decedent had stricken the provision from his will, the ex-wife would not have been able to file a claim, not even for breach of contract to leave property by will. At most, the arrangement appeared to be one by which the husband had a right to redeem or pay off the "marital" rights at a fixed round sum.

ported its conclusion with a reference to contract cases. Nevertheless, the opinion in the case is susceptible of the interpretation that a husband and wife would be permitted to enter into a post-nuptial agreement, estimating the worth of the marital rights of the wife and containing a promise on the part of the husband to leave his wife that amount by will, under which she could then assert a claim against his estate free from the inheritance tax which would otherwise attach. It is obvious that the Greiner case, if taken at face value, could serve to create a non-statutory "marital deduction" under the Illinois inheritance tax law, but it is unlikely that the court will follow the decision to any such logical conclusion. In the meantime, it is also equally obvious that further confusion will be likely to result until the decision has been brought into proper focus.<sup>86</sup>

The decision in *People v. Becker*<sup>87</sup> is worthy of mention for it confirms the so-called "proration of deductions" doctrine, in inheritance tax cases, previously announced in *People v. Luehrs*.<sup>88</sup> The court did, however, enlarge on the point by indicating that the fact that another state has allowed all of the deductions to be taken for purposes of the tax in that state would not deprive the taxpayer of the benefit of the Illinois doctrine.

It is possible that, through the medium of the case of *Modern Dairy Company v. Department of Revenue*,<sup>89</sup> the Supreme Court has merely added another to its long list of decisions with reference to inclusion and exclusion of items within the Retailer's Occupation Tax Act, but it may have enunciated a somewhat new

<sup>86</sup> In a sense, the court appears to have achieved, with reference to the Illinois inheritance tax, a result comparable to that reached by the United States Supreme Court, with reference to gift taxes, in divorce situations. In *Merrill v. Fahs*, 324 U. S. 308, 65 S. Ct. 655, 89 L. Ed. 963 (1945), a five-to-four decision, it was held that a transfer of \$300,000 for a release of the intended wife's marital right by ante-nuptial agreement was subject to a gift tax. In 1950, however, in *Harris v. Commissioner*, 340 U. S. 106, 71 S. Ct. 181, 95 L. Ed. 111 (1950), another five-to-four decision, the court held that the transfer of property pursuant to a decree of divorce, even though based on a voluntary settlement agreement, was not subject to federal gift taxes.

<sup>87</sup> 413 Ill. 102, 108 N. E. (2d) 5 (1952).

<sup>88</sup> 408 Ill. 383, 97 N. E. (2d) 307 (1951). The doctrine holds, in substance, that where property of the decedent is situated in a state or states other than Illinois, it is proper and equitable to prorate the deductions upon the basis of the property in Illinois subject to inheritance tax.

<sup>89</sup> 413 Ill. 55, 108 N. E. (2d) 8 (1952), noted in 2 DePaul L. Rev. 320.

and liberalized approach to the whole problem in an attempt to extricate itself from the rather narrow and technical attitude taken in some of the earlier cases. What the court actually decided was that sales of milk in bulk to a state hospital for consumption by its patients did constitute sales at retail within the purview of the statute.<sup>90</sup>

In the earlier cases, a very restricted meaning had been given to the phrase "use or consumption," limiting "use" to mean "long continued possession and enjoyment of a thing to the purposes for which it is adapted," and "consumption" to mean "destruction by use." This test, as applied to vendors of leather goods to shoe repair men,<sup>91</sup> to vendors of optical goods to optometrists,<sup>92</sup> to vendors of medical supplies to hospitals and doctors,<sup>93</sup> and to vendors of building supplies to contractors,<sup>94</sup> had produced the result that, in each instance, the sales were not subject to the tax because the respective vendees were not ultimate users or consumers.<sup>95</sup> Reviewing attempts by the legislature to rectify this situation by amendment, and noting the holding in *Fefferman v. Marohn*,<sup>96</sup> where sales of clothing and clothing materials to state and county institutions for the use of their wards were held taxable, brought the court even with the facts in the case in question. In support of the decision to reject the shackles of the earlier cases, the court said it had come to the conclusion that "it was not the intention of the legislature to use the terms 'user and consumer' in the title of the act in the strict and narrow construction" previously given thereto.<sup>97</sup> It is likely, therefore, that other occupations will feel the impact of the tax in question.<sup>98</sup>

<sup>90</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 122, § 440.

<sup>91</sup> *Revzan v. Nudelman*, 370 Ill. 180, 18 N. E. (2d) 219 (1939).

<sup>92</sup> *American Optical Co. v. Nudelman*, 370 Ill. 627, 19 N. E. (2d) 582 (1939).

<sup>93</sup> *Mallen Co. v. Department of Finance*, 372 Ill. 598, 25 N. E. (2d) 43 (1940).

<sup>94</sup> *Material Service Corp. v. McKibbin*, 380 Ill. 226, 43 N. E. (2d) 939 (1942).

<sup>95</sup> The net product was avoidance of the tax entirely, for the vendees were held to transfer the personal property as a mere incident to the furnishing of services: *Huston Bros. Co. v. McKibbin*, 386 Ill. 479, 54 N. E. (2d) 564 (1944); *Babcock v. Nudelman*, 367 Ill. 626, 12 N. E. (2d) 635 (1938).

<sup>96</sup> 408 Ill. 542, 97 N. E. 785 (1951).

<sup>97</sup> 413 Ill. 55 at 65, 108 N. E. (2d) 8 at 14.

<sup>98</sup> Note has been taken elsewhere of two other tax cases. The decision in *Johnson v. Halpin*, 413 Ill. 257, 108 N. E. (2d) 429 (1952), holding the Cigarette Use Tax Act, Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 453.33 et seq., to be valid, is discussed

## VIII. TORTS

It could be said that tort law experienced a veritable revolution for, in no less than four instances, acknowledged wrongdoers were stripped of protections which they had, prior to this, enjoyed. The case of *Eick v. Perk Dog Food Company*<sup>1</sup> was the first to break with tradition. The Appellate Court for the First District there recognized, for the first time in Illinois, a cause of action based upon an alleged invasion of a right of privacy. The case was one in which the defendant had obtained a photograph of the plaintiff, a blind girl, and had, without her consent, used the same to promote the sale of its dog food.<sup>2</sup> The court found abundant support, in the decisions achieved in other jurisdictions, for the view that the complaint stated a cause of action in tort, notwithstanding the fact that the only damage alleged to have been suffered took the form of mental anguish.

Although it would be technically proper only to mention that the Appellate Court for the Second District, in *Amann v. Faidy*,<sup>3</sup> refused to overturn the hitherto well-established rule that, in Illinois, an action may not be maintained, on behalf of an infant, for injuries received by it prior to birth,<sup>4</sup> it is especially significant to note that the Illinois Supreme Court, by its decision therein,<sup>5</sup> coming after the period fixed for this survey, actually reversed that holding and all earlier cases in point. The law would now permit a recovery for such an injury, at least where the infant was born alive.

Extremely short-lived, however, was the revolution generated

above under Constitutional Law, particularly notes 22 to 26 inclusive. Mention of the holding in *People v. Roth, Inc.*, 412 Ill. 436, 107 N. E. (2d) 692 (1952), appears in the section on Civil Practice and Procedure, particularly notes 56-8. While the last mentioned case tends to protect tax revenue against "deals," it suggests that if business men are not to be protected by the doctrine of *res judicata*, except in those cases where the decision has been affirmed by the state supreme court, the volume of tax litigation to be handled by the staff of the Attorney General will be due for an early increase.

<sup>1</sup> 347 Ill. App. 293, 106 N. E. (2d) 742 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 261, 41 Ill. B. J. 120, 28 Notre Dame Law. 146.

<sup>2</sup> A second count charging libel was stricken because the court held the captions used in conjunction with the photograph were not defamatory.

<sup>3</sup> 348 Ill. App. 37, 107 N. E. (2d) 868 (1952). See also the related case of *Rodriguez v. Patti*, 348 Ill. App. 322, 108 N. E. (2d) 830 (1952).

<sup>4</sup> *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N. E. 638 (1900).

<sup>5</sup> See *Amann v. Faidy*, 415 Ill. 422, 114 N. E. (2d) 412 (1953).

by the holding in the case of *Brandt v. Keller*,<sup>6</sup> one which permitted a wife to sue her husband, in tort, for a personal injury inflicted during coverture. The legislature, apparently opposed to the view so taken, promptly amended the Married Women's Act to provide that "neither husband nor wife may sue the other," as in tort, for matters of this character.<sup>7</sup>

Paralleling a development similar to that made with respect to charitable corporations,<sup>8</sup> an immunity from tort liability formerly enjoyed by quasi-municipal corporations was partially destroyed by the holding in the case of *Thomas v. Broadlands Community Consolidated School District, No. 201*,<sup>9</sup> wherein a minor plaintiff was enabled to recover from the school district for injury sustained while in the defendant's playground, at least to the extent the school district carried liability insurance. A claim that the defendant, like the state, was not subject to suit without its consent was held to be without historical basis.

Less startling, but indicative of liberality in view, are decisions achieved in two other cases. In the first, that of *McCleod v. Nel-Co Corporation*,<sup>10</sup> the doctrine of *res ipsa loquitur* was held applicable to a situation wherein plaster fell from the ceiling of a room in defendant's hotel upon the plaintiff sleeping there. In the other, a case entitled *Tatham v. Wabash Railroad Company*,<sup>11</sup> it was decided that a plaintiff could impose liability under the Federal Employers' Liability Act upon his employer who had negligently hired one known to be vicious and ill-tempered and who had failed to take reasonable steps to protect the plaintiff from an intentional harm offered by the misfit, although the court noted that contrary decisions existed elsewhere.

In addition to negligence cases discussed above,<sup>12</sup> mention

<sup>6</sup> 413 Ill. 503, 109 N. E. (2d) 729 (1952), reversing 347 Ill. App. 18, 105 N. E. (2d) 796 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 343.

<sup>7</sup> Laws 1953, p. 437, S.B. 194; Ill. Rev. Stat. 1953, Vol. 1, Ch. 68, § 1.

<sup>8</sup> See *Moore v. Moyle*, 405 Ill. 555, 92 N. E. (2d) 81 (1950), noted in 28 CHICAGO-KENT LAW REVIEW 268, 38 Ill. B. J. 581.

<sup>9</sup> 348 Ill. App. 567, 109 N. E. (2d) 636 (1953), noted in 31 CHICAGO-KENT LAW REVIEW 279.

<sup>10</sup> 350 Ill. App. 216, 112 N. E. (2d) 501 (1953).

<sup>11</sup> 412 Ill. 568, 107 N. E. (2d) 735 (1952).

<sup>12</sup> See above, under the heading of Property, sub-topic Landlord and Tenant, particularly notes 51 to 56, for certain cases dealing with tort liability in conjunction with demised premises.



ought to be made of the conflict which now exists, in at least two of the Appellate Court districts, over the point as to whether or not the operator of a motor vehicle, who leaves the same unattended with the ignition key in the switch,<sup>13</sup> should be held liable for injury inflicted by a thief who is, thereby, enabled to steal the car. The Third District, in the case of *Cockrell v. Sullivan*,<sup>14</sup> earlier absolved the operator from liability. The First District, however, in the light of the decision in *Ney v. Yellow Cab Company*,<sup>15</sup> appears to consider the matter to be one in which the question of proximate causation should be left to the jury and not be decided as a matter of law. In addition thereto, brief mention might be made of the fact that, on the trial of a noteworthy case concerning the right of a spouse to recover from the other spouse's employer for a negligent tort inflicted by the spouse-agent,<sup>16</sup> it was determined that the injured plaintiff was a "guest" within the meaning of the Motor Vehicle Act,<sup>17</sup> hence not entitled to succeed.<sup>18</sup>

This survey may well be closed with a note that, in the only conservative tort decision of the year,<sup>19</sup> the plaintiff was denied a right to recover for a malicious interference with a contract to marry in the absence of independent proof of slanderous or libelous conduct.<sup>20</sup>

<sup>13</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 189, forbids this practice.

<sup>14</sup> 344 Ill. App. 620, 101 N. E. (2d) 878 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 277.

<sup>15</sup> 348 Ill. App. 161, 108 N. E. (2d) 508 (1952). The case is consistent with the earlier decision, achieved by a divided court, in *Ostergard v. Frisch*, 333 Ill. App. 359, 77 N. E. (2d) 537 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 225.

<sup>16</sup> See the earlier holding in *Tallios v. Tallios*, 345 Ill. App. 387, 103 N. E. (2d) 507 (1952).

<sup>17</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 58a.

<sup>18</sup> *Tallios v. Tallios*, 350 Ill. App. 299, 112 N. E. (2d) 723 (1953). The proof revealed that the vehicle in question had been stopped to permit the plaintiff to search for a lost purse but was started up again while the wife had one foot on the ground and one on the running board. The Appellate Court held she was still "riding in a motor vehicle as a guest."

<sup>19</sup> See *Brown v. Glickstein*, 347 Ill. App. 486, 107 N. E. (2d) 267 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 175.

<sup>20</sup> See ante, under the heading of Civil Practice and Procedure, particularly notes 34 to 36, for mention of the ultra-conservative holding in the case of *Seymour v. The Union News Company*, 349 Ill. App. 197, 110 N. E. (2d) 475 (1953), dealing with the applicable period of limitation in an unwholesome food case.